Florida Real Property and Business Litigation Report

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Dear v. Q Club Hotel, LLC, Case No. 17-13127 (11th Cir. 2019).
The following language in a condominium declaration limits the ability to back-charge "at any time" to a period of a year and prevents the operator of a condominium hotel from back-charging for common expenses due for previous years:
"[t]he original charge for any year shall be levied for the calendar year (to be reconsidered and amended, if necessary at any appropriate time during the year[]."

Luxottica Group, S.p.A. v. Airport Mini Mall, LLC, Case No. 18-10157 (11th Cir. 2019).
Landlords may be contributorily liable for trademark infringement under § 32 of the Lanham Act, 15 U.S.C. § 1114, when the landlord has knowledge of specific acts of direct infringement.

Abdo v. Abdo, Case Nos. 2D18-2270, 2D18-2764 (Fla. 2d DCA 2019).
A constructive trust may be imposed in suits claiming derivative action and breach of fiduciary duty claims.

Schwob v. Goss, Case No. 2D18-4480 (Fla. 2d DCA 2019).
A circuit court has no jurisdiction to rule that a private utility has a Constitutional right to discontinue water and sewer service, as utility service is exclusively regulated by the Florida Public Service Commission.

Young Land USA, Inc. v. Credo LLC, Case No. 3D18-2146 (Fla. 3d DCA 2019).
A sheriff's execution sale eliminates the interest of inferior clams which were recorded after the judgment that served as the basis for the execution.

Greene v. Johnson, Case No. 3D18-2547 (Fla. 3d DCA 2019).
Equitable estoppel permits non-signatories to a contract to compel arbitration of claims brought by a signatory if the signatory raises allegations of concerted misconduct by both the non-signatory and one or more of the signatories to the contract; however, equitable estoppel on the basis of intertwined claims applies only when a signatory raises allegations of substantially interdependent and concerted misconduct by both a non-signatory and one or more of the signatories to the agreement.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13127

D.C. Docket No. 0:15-cv-60474-JIC

GARY DEAR,

Plaintiff - Appellee,

versus

Q CLUB HOTEL, LLC,

Defendant - Appellant.

No. 17-14285

D.C. Docket No. 0:15-cv-60474-JIC

GARY DEAR,

Plaintiff - Appellant,

versus

Q CLUB HOTEL, LLC,

Defendant - Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(August 9, 2019)

Before WILLIAM PRYOR, NEWSOM, and BRANCH, Circuit Judges.

NEWSOM, Circuit Judge:

This case concerns a contract dispute between Q Club—the entity that operates the condominium-hotel at the Hilton Fort Lauderdale Beach Resort—and a class of condo owners over the meaning of the "Declaration" that governs the parties' relationship. We're focused here on the Declaration's cost-sharing arrangement for the maintenance of certain amenities that aren't tied to any particular condo unit—expenses that the Declaration aptly calls "Shared Costs."

Litigation commenced soon after Q Club announced that it would change the methodology that it uses to calculate these Shared Costs. The new methodology, Q Club explained, would apply not only on a going-forward basis but also retroactively. That meant, in effect, that the owners would be re-billed for assessments that they had paid (or as Q Club sees it, underpaid) in years past.

The owners' complaint alleged that Q Club's new methodology breached the Declaration as applied both retroactively and prospectively. The district court

agreed with the first contention, but a jury disagreed with the second. The parties now appeal the respective judgments against them. The owners separately argue that the district court erred by denying their request for a new trial based on what they say constitutes newly discovered evidence that could have swayed the jury on the prospective-application question. After careful review, we affirm across the board.

I

A

The Hilton Fort Lauderdale Beach Resort includes a number of "Commercial Units" and "Residential Units," as well as one "Hotel Unit." The Residential Units aren't your typical condominiums; as the complaint explains, "no guest, including any Residential Unit owner, may occupy a Residential Unit for more than 120 days in any calendar year." This restriction helps to "ensure the transient nature of the use of the Residential Units"; the owners serve dual roles as both "investor[s] and part-time resident[s] who [can] take advantage of the revenue-generating benefits of putting their unit into the hospitality inventory to be rented out as a luxurious hotel suite when not in use."

The "Declaration of Q Club Resort and Residences Condominium" outlines a cost-sharing arrangement for the maintenance of what it calls "Shared Components." These Shared Components—which Q Club is responsible for

maintaining—include, among other things, "the main hotel lobby; the pools and pool deck; the fitness center . . . and all parking areas and/or parking garages located within the Condominium property." In short, they comprise many of what one might typically call the "common areas." The Declaration grants Residential and Commercial Unit Owners an easement to travel freely through and enjoy the Shared Components in exchange for periodic payments of "Shared Costs." Shared Costs are those "incurred by [Q Club] in (or reasonably allocated to) the repair, replacement, improvement, maintenance, management, operation, ad valorem tax obligations and insurance of the Shared Components." The Declaration requires Unit Owners to pay a portion of these Shared Costs. In particular, Unit Owners must—

> pay to [Q Club] annual charges for the operation and insurance of, and for payment of 40.4967% of the Shared Costs . . ., the establishment of reasonable reserves for the replacement of the Shared Components and the furnishings and finishings thereof, capital improvement charges, special charges and all other charges hereinafter referred to or lawfully imposed by [Q Club] in connection with the repair, replacement, improvement, maintenance, management, operation, and insurance of the Shared Components, all such charges to be fixed, established and collected from time to time as herein provided.

Shared Costs, the Declaration further explains, "shall be paid for in part through charges (either general or special) imposed against the Residential Units and the Commercial Units in accordance with the [Declaration's] terms."

This arrangement continued without incident from the Declaration's inception in 2007 until 2012, when Q Club determined that it had inadvertently omitted certain expenses that should have been included as Shared Costs. As Q Club describes it, that meant that the Unit Owners hadn't been paying the required 40.4967% of the Shared Costs. Accordingly, it notified the Unit Owners that it would begin to use a different methodology going forward and, further, that it intended to recoup the forgone charges over a 10-year period by applying the new methodology retroactively.

B

A class of Unit Owners—whom we'll call "Dear," after the lead plaintiff—filed this action in Florida state court, and Q Club successfully removed to federal court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1453. Dear's complaint asserted (1) that the Declaration doesn't permit Q Club to "back charge" for costs incurred but not assessed and (2) that Q Club's new methodology for determining Shared Costs includes items that it shouldn't. For simplicity's sake, we'll call the first issue the "back-charging" question and the second the "Shared Costs" question.

Because one of the appeals before us turns on whether the district court properly submitted a particular issue—namely, the Shared Costs question—to the

jury, a bit of procedural history is necessary. The parties initially agreed in their Joint Pretrial Stipulation that there were no "issues of law" for the district court to decide. On the back-charging question, Dear submitted as an "issue[] of fact which remain[ed] to be litigated at Trial" the question whether Q Club, "in violation of the Declaration," retroactively assessed Unit Owners for Shared Costs going back to 2007. Dear further included the Shared Costs question among the "issues of fact" for the jury's consideration—in particular, whether "Q Club breached the Declaration . . . by charging and collecting expenses . . . as Shared Costs . . . that are not authorized by the Declaration." For its part, Q Club didn't say anything about the back-charging issue, but it agreed with Dear that whether it had breached the Declaration "by charging for items that were not Shared Costs" was a question of fact for the jury.

The parties' unanimity on the division of labor between judge and jury was short-lived. When asked by the district court (in a discussion about the appropriateness of considering industry custom) whether "the declaration clearly define[s] what a shared component is," Dear answered "[a]bsolutely." In response, Q Club said that "if this definition is as clear as [Dear] says," then it was "baffled as to why this is a jury trial," and in light of Dear's statement Q Club pivoted to argue that the Shared Costs question was "a matter of law for [the court] to decide, not for the jury." Dear, though, stuck to his guns. When pressed by the district

court whether he agreed with Q Club that the Shared Costs issue was "for the Court [rather than] the jury," Dear responded that "it is for the jury." The district court acceded to Dear's view, stating that the determination whether a breach of contract had occurred was "a factual issue" "for the jury determine." It did so over Q Club's objections that it would be improper to "ask[] the jury to make a legal determination of what [the Declaration] says" and that the jury shouldn't "decide if something is a shared component or not."

Thereafter, Dear's insistence that the Shared Costs question should go to the jury seemed to soften, as evidenced by several instances in which he acknowledged that the issue—or at least portions of it—might be purely legal. For example, when Q Club moved under Federal Rule of Civil Procedure 50(a) for judgment as a matter of law on both the back-charging issue and the Shared Costs issue, it argued that whether the Declaration authorized its changes was "a question of law"—there was, it said, "nothing for the jury to hear." Dear agreed—sort of. He responded that "[t]here's no doubt that [the] two issues in this case are issues of law" and, to that end, he said that he was "expecting and urging the Court to instruct the jury that there is no ambiguity [in the Declaration]." In the same vein, Dear acknowledged that "[w]hether something is a shared component is a matter this Court can determine as a matter of law," and he even indicated that he would be "asking the Court at the conclusion of the case to declare that anything that was

expended in the inside of these private property residential condominiums" was not "recoverable as shared costs."[1] Conspicuously, though, Dear never filed his own Rule 50(a) motion on the Shared Costs issue.

Although the district court denied Q Club's Rule 50(a) motion as to both issues, it later determined that the back-charging issue (but not the Shared Costs issue) presented a legal question that it could and should decide for itself. The court thereafter held that the Declaration "clear[ly] and unambiguous[ly]" forbids "retroactive charging for costs incurred in prior years." Specifically, the court concluded that §§ 12.3 and 12.4, on which Q Club staked (and still stakes) its back-charging position—much more on that below—provided no authority for retroactive assessments. Accordingly, the court entered judgment as a matter of law for Dear on the back-charging issue.

The case proceeded to trial on the Shared Costs issue. Notably for present purposes, at the charge conference the parties tangled over several key jury instructions. Two disputes are relevant here. First, Dear wanted the district court to tell the jury that the court had decided the back-charging issue in his favor. After some back and forth—Q Club complained that Dear's proposed instruction

[1] Similarly, even after the district court denied Q Club's Rule 50(a) motion, Dear objected to the testimony of a Q Club expert on the ground that "[a]ny issues regarding the interpretation of the declaration are a matter of law" and that it was for the district court to decide "what those unambiguous terms mean."

would be prejudicial—the court settled on the instruction that the matter "ha[d] been adjudicated" and that the jury "should not consider this issue" in deciding the Shared Costs question. Second, Dear asked the district court to instruct the jury that, "as a matter of law," the Declaration's definition of Shared Components controlled and that the jury was "required to use that definition." (Notably, in so arguing, Dear admitted that he "should have probably argued this in the Rule 50.") The court declined to give Dear's proposed instruction; instead, it charged the jury that the parties "dispute[d] the meaning of certain terms," including "shared costs" and "shared components" and that in reaching its decision, it should "consider the plain and ordinary meaning of the language used in the contract" and "the circumstances surrounding the making of the contract."

Thereafter, the jury returned a unanimous verdict in Q Club's favor, finding that its new methodology for calculating Shared Costs didn't breach the Declaration. Dear filed a post-judgment motion for a new trial. (He didn't file a renewed motion for judgment as a matter of law under Rule 50(b) because he hadn't initially moved—as the Rule requires—for judgment as a matter of law under Rule 50(a).[2]) Dear contended (1) that the district court had erred by

[2] *See, e.g.*, 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2533 (3d ed. 2019) ("The requirement in Rule 50(a)(2) that grounds be stated on a motion for judgment as a matter of law before submission of the case to the jury is mandatory. Its purpose is to apprise the trial court of the moving party's position to see if any defects can be corrected before the jury

allowing the jury to decide the Shared Costs issue, (2) that the court should have given his requested jury instructions, and (3) that he had new evidence that contradicted Q Club's position regarding Shared Costs and proved that Q Club had been "double-billing" for certain items.

On the first issue, the district court held that, even if it was an error to send the Shared Costs issue to the jury, it was an error that Dear had invited. The court emphasized that Dear had demanded a jury, hadn't moved for summary judgment, and had insisted at the pre-trial calendar call that the Shared Costs issue presented a factual question. The court further concluded that its jury instructions weren't misleading or erroneous and that, in any event, Dear couldn't show that the trial would have turned out any differently had his proposed charge been given. Finally, the court held that the new evidence that Dear had proffered didn't actually contradict Q Club's position on Shared Costs.

These appeals followed, with Q Club appealing the district court's adverse determination of the back-charging issue, and Dear appealing the jury's verdict on the Shared Costs issue and the court's denial of its new-trial motion.

II

We'll start with Q Club's back-charging argument.

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retires, and the failure of the motion to state the specific grounds relied on is in itself a sufficient basis for denial of the motion.").

First, a bit of black-letter background. The interpretation of a contract is a question of law that we review *de novo*. *S.-Owners Ins. Co. v. Easdon Rhodes & Assocs. LLC*, 872 F.3d 1161, 1163 (11th Cir. 2017). In construing the Declaration here, we are *Erie*-bound to apply Florida contract-interpretation principles. *See In re Chira*, 567 F.3d 1307, 1311 (11th Cir. 2009). Accordingly, we will interpret the Declaration "in accordance with its plain meaning, and, unless an ambiguity exists, [will] not resort to outside evidence or the complex rules of construction to construe the contract." *Key v. Allstate Ins. Co.*, 90 F.3d 1546, 1549 (11th Cir. 1996) (citations omitted). In doing so, we must take care not to create confusion "by adding hidden meanings, terms, conditions, or unexpressed intentions." *Id.* (citations omitted). And we will construe the Declaration as a whole and will avoid treating terms "as redundant or mere surplusage" if "any meaning, reasonable and consistent with other parts, can be given to it." *Equity Lifestyle Props., Inc. v. Fla. Mowing & Landscape Serv., Inc.*, 556 F.3d 1232, 1242 (11th Cir. 2009) (quoting *Roberts v. Sarros*, 920 So. 2d 193, 196 (Fla. 2nd Dist. Ct. App. 2006)).

Q Club's back-charging argument focuses on § 12 of the Declaration. Q Club asserts that § 12 "authorizes [it] to revise charges for Shared Costs and levy those revised charges against Unit Owners" retroactively. To assess Q Club's position, we'll need to unpack the relevant portions of the Declaration bit by bit.

As already explained, the Declaration states that Unit Owners are responsible for a portion of Shared Costs—meaning those costs "incurred by [Q Club] in (or reasonably allocated to) the repair, replacement, improvement, maintenance, management, operation, ad valorem tax obligations and insurance of the Shared Components." And again, these Shared Costs are payable through either "general" or "special" charges "imposed" against the Unit Owners.[3]

All here agree that we should limit our discussion to "general charges," as "special charges" are unit-specific penalties levied for "misuse" of the Hotel Unit. Within the "general charges" category, the Declaration speaks of the following: (1) "annual charges," also called—among other things—"regular charges" or "annual regular charges"; (2) "capital improvement charges"; (3) charges for "the establishment of reasonable reserves for the replacement of the Shared Components"; and (4) a catch-all for "all other charges hereinafter referred to or lawfully imposed" by Q Club "in connection with the repair, replacement, improvement, maintenance, management, operation, and insurance of the Shared Components."

[3] The Declaration occasionally speaks of charges "imposed," and elsewhere, charges "levied." We'll treat these terms as synonyms, as the dictionaries do. *Compare, e.g.*, Oxford Dictionary of English 879 (3d ed. 2010) (defining "impose" as to "require (a duty, charge, or penalty) to be undertaken or paid"), *with, e.g.*, *id.* at 1016 (defining "levy" as to "impose (a tax, fee, or fine)"). *See also* Black's Law Dictionary 873 (10th ed. 2014) (defining "impose" as "levy or exact (a tax or duty)").

Q Club contends, in particular, that back-charging is authorized under either or both of the "annual charge[]" and "other charge[]" headings. We'll examine each candidate in turn.

A

Q Club puts most of its eggs in the "annual charge[]" basket. It contends that retroactive assessments are permissible because the Declaration authorizes "revised charge[s]" that needn't necessarily be imposed or altered within a particular calendar year. For support, Q Club points to the following language in § 12.3(b): "The charge amount (and applicable installments) may be changed *at any time* by [Q Club] from that originally stipulated or from any other charge that is in the future adopted by [Q Club]." Clear as a bell, Q Club insists: the Declaration says that annual charges can be changed "at any time," without temporal restriction.

If we were to take the "at any time" language in isolation, Q Club's theory might work. But we can't, and so it doesn't. In contracts, as in statutes, "[t]he entirety of the document . . . provides the context for each of its parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (Thomson/West 2012). And § 12.3(b)'s context sinks Q Club's "at any time" position. To explain why, we'll need to show our work.

In relevant part—Warning: Dense contractual jargon ahead!—§ 12.3(b) provides as follows:

> The annual regular charges provided for in this Section shall commence on the first day of the month next following the recordation of this Declaration and shall be applicable through December 31 of such year. Each subsequent annual charge shall be imposed for the year beginning January 1 and ending December 31. The annual charges shall be payable in advance in monthly installments, or in annual, semi- or quarter-annual installments if so determined by [Q Club] (absent which determination they shall be payable monthly). The charge amount (and applicable installments) may be changed at any time by [Q Club] from that originally stipulated or from any other charge that is in the future adopted by [Q Club]. The original charge for any year shall be levied for the calendar year (to be reconsidered and amended, if necessary, at any appropriate time during the year), but the amount of any revised charge to be levied during any period shorter than a full calendar year shall be in proportion to the number of months (or other appropriate installments) remaining in such calendar year.

Our breakdown of "annual charges" begins where § 12.3(b) does. The provision explains that the first set of "annual regular charges shall commence" on the first day of the first month following the Declaration's recording—which occurred in 2007—"and shall be applicable through December 31 of such year." Thereafter, "[e]ach subsequent annual charge shall be imposed for the year beginning January 1 and ending December 31," with the charges "payable in advance" either annually, semi- or quarter-annually, or monthly. The upshot, it

seems, is to ensure that Unit Owners have a sense of the "annual charge . . . imposed" come—at the latest—January 1 of a given year.[4]

Then comes the language that Q Club emphasizes. The Declaration provides that the initial "annual charge" (or as it's later called, the "original charge") isn't set in stone, but rather that "[t]he charge amount (and applicable installments) may be changed *at any time* by [Q Club] from that originally stipulated or from any other charge that is in the future adopted by [Q Club]." Q Club takes this to mean that it can alter the originally specified charge amounts for past years and that it can do so, quite literally, "at any time"—be it one year or, as in this case, even six years down the road.

Wait, though. In the very next sentence, the Declaration goes on to say that "[t]he original charge for any year shall be levied for the calendar year (to be reconsidered and amended, if necessary[])]"—and here's the key language—"at any appropriate time *during the year*[]." The addition of the words "during the year" to the phrase "at any appropriate time" narrows the window for an amendment of an "annual charge" that has already been "levied." In other words, the reach of the *general* statement that charges can be changed "at any time" is narrowed by the *specific* limitation that the "original charge" for a given year can be amended at

[4] The record supports this reading. For instance, in December 2012, Q Club provided Unit Owners with the "2013 Annual Charge Notice," which set the "projected 2013 annual charge amount" to be collected from all Unit Owners at just over $3.7 million.

any "appropriate time *during the year*." *Cf. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)) ("[I]t is a commonplace of statutory construction that the specific governs the general."). Read in context, we think that § 12.3(b) is best understood to mean that a given year's "annual charge[]" can be "amended" only *within the year* that it is imposed.

Q Club complains that our reading neuters the effect of the "at any time" language, such that the sentence "could be removed from the text entirely without changing the meaning of the provision." We don't think so. Yes, the Declaration gives Q Club license to "revise[]" charges "at any time"—including for periods beyond the year in which the revision is instituted. But § 12.3(b) contemplates that such revisions will typically occur from one year to the next. Were that not the case, it would make little sense for the Declaration to include the proration qualifier about "any revised charge to be levied during any period shorter than a full calendar year." That is, *all* intra-year revisions would "be levied during a[] period shorter than a full calendar year." The qualifier's inclusion, therefore, suggests that "revised charge[s]" can (and often will) include changes that apply from one year to the next.

Q Club further asserts that its reading of § 12.3(b) is bolstered by "non-waiver principles expressed in section 12.4." Section 12.4 provides, as relevant

here, that Q Club's failure "to send or deliver bills or notices of charges shall not relieve [Unit] Owners from their obligations hereunder." Q Club infers a greater-includes-the-lesser sort of principle from this language; it says that "[i]f a failure by Q Club to send *any* notice" works no waiver, then surely sending a bill for the wrong amount similarly doesn't "relieve the Unit Owners' obligation to pay the appropriate percentage of Shared Costs" either. Clever, but not right. Section 12.4 means just what it says: it addresses only those instances in which Q Club fails to deliver a bill at all, not those in which Q Club sends a bill for what it later claims was the wrong amount. Section 12.4 does interact with § 12.3(b), as Q Club says, but only to set a default charge in the absence of a bill. Whereas § 12.4 means that Unit Owners are still on the hook for some portion of Shared Costs, § 12.3(b) explains what that portion is: the same "amount payable for the previous period," until changed. It's a different question altogether—one that § 12.3(b) doesn't address—whether Q Club can revise annual charges outside the year that they are originally "levied."

From how they are initially "imposed" to the way they can be "revised," it's clear to us that a given year's "annual charges" may not be retroactively changed in future years. Rather, when the Declaration speaks of "revised" annual charges, it contemplates that the revisions will occur within the year that the costs are

incurred. This reading, we think, is faithful not only to isolated snippets of the Declaration's text, but also to § 12 when considered as a whole.

B

Unable to fit retroactive assessments into the "annual charge[]" bucket, Q Club next contends that back-charging is permissible under § 12's catchall for "all other charges hereinafter referred to or lawfully imposed . . . in connection with the repair, replacement, improvement, maintenance, management, operation, and insurance of the Shared Components." This make sense, Q Club argues, not only because these "other costs" aren't subject to any clear temporal limitation, but also in light of the usual rule that provisions in a contract should be construed to avoid surplusage. *See Equity Lifestyle Props.*, 556 F.3d at 1242.

Though Q Club makes some fair points, this argument too falls short. The problem is that the Declaration doesn't speak of "other charges" in the abstract; rather, permissible "other charges" must be either "hereinafter referred to" or "lawfully imposed." As Q Club all but conceded at oral argument, the Declaration doesn't "refer[] to" any "other charges" except annual charges, reasonable-reserve charges, capital improvement-charges, and special charges—*i.e.*, the enumerated categories that precede the "other charges" language and that we've dealt with already. We conclude, therefore, that "other charges hereinafter referred to" is—unfortunately—surplusage. It happens. *See* Scalia & Garner, *supra*, at 210

(explaining in the hypothetical example of "federal Senators, federal Representatives, and other members of Congress," that the "concluding phrase simply cannot bear any other meaning than the one exhausted by the preceding specifics" and "must be treated as surplusage").

That leaves us with "[o]ther charges . . . lawfully imposed." Q Club assures us that it "has located nothing in Florida law that is hostile to" back-charging and adds that other states—namely, Illinois, Maine, New Jersey, and Pennsylvania—"also lack hostility" to such charges. We are unmoved. The fact—if it's indeed a fact—that retroactive assessments may not be forbidden by the general laws of some states doesn't mean that they are authorized by the governing Declaration here. We can assume that the phrase "[o]ther charges . . . lawfully imposed" means *something*, but we think that Q Club makes way too much of way too little. To say—despite all of the contrary textual indications—that this vague catchall provision allows Q Club to bill for one amount only to revise the charge years later would be akin, as has been said in other contexts, to finding an elephant in a mousehole. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Without a stronger signal from Florida's courts, it's not our place to read in this kind of "hidden term" into the Declaration. *See Key*, 90 F.3d at 1549.

* * *

Because neither the "annual charge[]" nor "other charge" heading fits the bill, we conclude that the district court correctly held that the Declaration doesn't permit the sort of back-charging that Q Club advocates. Q Club complains that our reading renders the agreement, "illogical, unjust, and unfair." But it's "not the function of the courts to 'rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain."' *Marriott Corp. v. Dasta Const.* Co., 26 F.3d 1057, 1068 (11th Cir. 1994) (quoting *Steiner v. Physicians Protective Tr. Fund*, 388 So.2d 1064, 1066 (Fla. 3d Dist. Ct. App. 1980)). We decline to stretch the Declaration's language in an effort to relieve Q Club of the "hardship" that stems from what appears to have been its own miscalculation.

III

We turn, then, to Dear's cross-appeal. Dear contends that the district court erred by submitting the Shared Costs issue to the jury. Alternatively, he says that even if it was proper to leave some interpretive matters to the jury, the court should have better guided the jury's decision-making process by giving a few additional jury instructions. And finally, Dear asserts that he discovered new evidence after the trial that entitles him to a new trial. We find no reversible error.

A

Dear first and primarily faults the district court for submitting the Shared Costs issue to the jury at all. He contends that the court should have resolved the Shared Costs issue in his favor and then instructed the jury that Q Club had been charging for Shared Costs in a manner that violated the Declaration. In other words, Dear insists that the only proper question for the jury was the amount of damages flowing from Q Club's as-a-matter-of-law breach.

The question, therefore, is who should have decided the Shared Costs issue—the judge (as Dear now says) or the jury (as happened)? "Under Florida law, as generally, where the language of an agreement is unambiguous, the legal effect of that language is a question of law and, as such, may be declared by the court." *Maccaferri Gabions, Inc. v. Dynateria Inc.*, 91 F.3d 1431, 1439 (11th Cir. 1996). If, however, the contract is "reasonably susceptible to more than one interpretation, it is ambiguous and its meaning is a question for the jury." *Id.* This standard is easier stated than applied, as it can be difficult to determine whether a contract is truly ambiguous. *See Gas Kwick, Inc. v. United Pac. Ins. Co.*, 58 F.3d 1536, 1539 (11th Cir. 1995) (citations omitted) (noting that "ambiguity is not invariably present when a contract requires interpretation"); *Meyers v. Selznick Co.*, 373 F.2d 218, 221 (2d Cir. 1966) (Friendly, J.) (explaining that the general principle that "[t]he construction of all written instruments belongs to the court" is

not an "unvarying rule" and noting the associated difficulties with deciding whether to send interpretive questions to a jury) (quotations omitted). Notably, though, Q Club doesn't seem to defend the district court's decision to send the issue to the jury by, say, highlighting any apparent ambiguities in the Declaration. And that's perhaps not surprising given Q Club's pre-trial (and mid-trial) position that the Shared Costs issue presented a question of law for the court and that it was "baffled as to why this [was] a jury trial."

All of this is to say that Dear may be right that the Shared Costs issue is a pure question of law and that the district court mistakenly sent it to the jury. The problem for Dear is that he never asked the court to take the issue away from the jury in a Rule 50(a) motion for judgment as a matter of law. Presumably in an effort to salvage his position from waiver, on appeal Dear claims—confusingly to us—that he "joined in Q Club's JMOL." But it's unclear how such a "join[der]" would work. Rule 50(a) requires that the movant "specify the judgment sought and the law and facts that entitle the movant to the judgment." In filing its motion, Q Club clearly complied, contending not only that "whether [its] actions [were] allowed under the contract" was "a question of law for the judge to decide" but also that it—Q Club—was entitled to a judgment as a matter of law because "there was no breach of the contract." Dear never filed a similar motion. And it makes no sense for Dear to say that he could piggyback on Q Club's motion because, of

course, Dear didn't agree with "the judgment sought" there—namely, a judgment *in favor of his adversary*.

Dear attempted to shore up his position at oral argument by asserting that Rule 50(a) motions can be made "at any time and in any form." And in fairness, we've taken a broad view of what constitutes a "motion" for judgment as a matter of law. In *Etienne v. Inter-County Sec. Corp.*, we construed a plaintiff's response to a defendant's Rule 50 motion as the plaintiff's own motion in light of our "liberal view of what constitutes a motion for judgment as a matter of law"—but only because the plaintiff there "requested that the court enter judgment for him" and because "the opposing party and the trial judge were informed of the [plaintiff's] argument." 173 F.3d 1372, 1374 (11th Cir. 1999). Even measured by that permissive standard, Dear's approach doesn't cut it. Missing from the record is *any* statement in response to Q Club's motion in which Dear contended that, as a matter of law, he was entitled to win then and there.[5]

The closest Dear came was saying that "[w]hether something is a shared component is a matter this Court can determine as a matter of law" and previewing that he planned to "ask[] the Court at the conclusion of the case to declare that

[5] Not for nothing, but at the conclusion of Q Club's oral Rule 50(a) motion, the district court noted that it was "required to view the evidence in a light most favorable to the *nonmoving* party, the Plaintiff [Dear]," and that "the *Defendant*'s [Q Club] Rule 50 motion will be respectfully denied." At no point during this colloquy did Dear follow up with a request that the court rule on any supposed Rule 50 motion of his own.

anything that was expended in the inside of these private property residential condominiums" wasn't "recoverable as shared cost for shared components." Critically, though, he never followed through on that pledge by filing a Rule 50(a) motion. And indeed, even during what he now describes as his act of "join[ing]" Q Club's motion for judgment as a matter of law, Dear framed his arguments exclusively in terms of how the court should eventually *instruct the jury*. He explained that "we're expecting and urging the Court to instruct the jury that there is no ambiguity [in the contract]" and, further, that "[t]he term shared component is listed under definitions and fully and completely defined, and so we're going to ask the Court at the conclusion of the case to instruct the jury on that." These statements demonstrate that, far from seeking to take the Shared Costs issue away from the jury, Dear envisioned that the jury would play a meaningful role in interpreting the Declaration.

Although Dear occasionally (if inconsistently) tried to suggest that contract-interpretation questions are "matter[s] of law" for the court, he never quite took the plunge: Despite hinting that he would, he never made a Rule 50(a) motion—or any other motion—asking "the Court . . . to declare" anything. In light of Dear's initial insistence that the Shared Costs issue should go to the jury and his failure to

file his own Rule 50(a) motion, his claim of error is forfeited at best.[6] *See Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 903 (11th Cir. 2004) (holding that "a party cannot assert grounds in the renewed motion that it did not raise in the earlier motion" to prevent the "sandbag[ging]" of opposing counsel) (quotations omitted).

We note in closing that even if Dear had preserved this issue, he hasn't established—or even really tried to establish—why the jury's verdict was wrong. Dear says repeatedly in his brief that the jury's verdict was "incorrect as a matter of law" and that Q Club's new methodology is "contrived." But he never explains *why* the jury's verdict was "incorrect as a matter of law" or *why* Q Club's methodology is "contrived." "[S]imply stating that an issue exists, without further argument or discussion," isn't enough. *Singh v. U.S. Atty. Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009). Because Dear hasn't established that he was entitled to judgment as a matter of law, he can't show that he was prejudiced by the district court's decision to send the Shared Costs issue to the jury.

[6] At worst, this was an error that (as the district court concluded) Dear invited. "Where invited error exists"—meaning that a party has "induced" the court into error by his own conduct—"it precludes a court from invoking the plain error rule and reversing." *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006) (quotations omitted). Dear's mid-trial efforts to correct his pre-trial call to send the issue to the jury—even though ultimately incomplete—may have prevented invited error here, but they don't save him from forfeiture. We note, however, that Dear's position on appeal would essentially allow him to get two bites at the apple by allowing him to hedge against an unfavorable jury verdict, a result that the invited-error doctrine is designed to prevent.

B

Dear separately argues that the district court erred in failing to give his requested jury instructions. He argues here that the court's failure to do so misled the jury, which, as a result, "returned a verdict that was incorrect as a matter of law."

District courts have "broad discretion in formulating jury instructions," and we assess the entirety of the instructions "to determine whether they fairly and adequately addressed the issue and correctly stated the law." *Christopher v. Cutter Labs.*, 53 F.3d 1184, 1190 (11th Cir. 1995) (citations omitted). When faced with an argument that a court abused its discretion in refusing to give a requested instruction, we will find reversible error only "if (1) the requested instruction correctly stated the law, (2) the instruction dealt with an issue properly before the jury, and (3) the failure to give the instruction resulted in prejudicial harm to the requesting party." *Roberts & Schaefer Co. v. Hardaway Co.*, 152 F.3d 1283, 1295 (11th Cir. 1998) (citation omitted).

With this background in mind, we will assess each of Dear's requested instructions separately.

1

Dear first argues that, at the very least, the district court should have instructed the jury to apply the term "Shared Components" as it is defined in the

Declaration itself. This instruction, Dear says, would have better "advise[d] the jury about the parameters of its decision."

Even if we were to grant that it might have been prudent for the district court to give Dear's instruction, we can't conclude that the court abused its discretion by not doing so. After examining the jury instructions in their entirety, we're convinced that they "fairly and adequately addressed the issue[s]" at hand. *Christopher*, 53 F.3d at 1190. The district court instructed the jury that the parties disputed the "meaning of certain items including . . . Shared costs [and] Shared components." And critically, the court continued that "[i]n deciding what the terms of [the] contract mean," the jury should "consider the plain and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract." Finally, the court told the jury to "assume that the parties intended the disputed terms in their contract to have their plain and ordinary meaning, unless [it] decide[d] that the parties intended the disputed terms to have another meaning." These statements, collectively, charged the jury to use the plain meaning of the term "Shared Components," which naturally would have pointed the jury in the direction of how that term is explained in the Declaration's definitions section.

Moreover, and in any event, Dear hasn't established that the district court's failure to give this instruction "resulted in prejudicial harm." *Roberts & Schaefer*,

152 F.3d at 1295. He hasn't, that is, explained why, but for this failure, the jury could have come out the other way—let alone why he is entitled to judgment as a matter of law. We find no reversible error on this point.

2

Dear next challenges the district court's instruction regarding its earlier ruling that the Declaration forbids back-charging. As already explained, the district court charged the jury "not [to] consider" the back-charging issue in reaching its decision on Shared Costs because it "ha[d] been adjudicated." Dear contends that the court's instruction prejudiced him because the jury might have concluded that he had lost. In his mind, the court should have told the jury that he'd won.

We find no abuse of discretion in the district court's choice here either. Indeed, we think that the district court was on firm footing framing the instruction the way it did. The question whether Q Club breached the Declaration by applying the new methodology retroactively has two subparts: first, whether the Declaration allows back-charging at all, and second—even if it does—whether Q Club nonetheless breached by including charges that were not in fact Shared Costs.[7]

[7] Dear even acknowledged this in his response to Q Club's Rule 50(a) motion, explaining that "[e]ven if the Court determines that somehow [Q Club] can go back six years and charge for items that were never charged, then you have to determine what of those charges were actually allocated reasonably," including the question of what "consisted of . . . shared components" and "shared cost for shared components."

The district court's "Order Re: Back-Charging" touches on the first question but doesn't say a lick about the second; it explains that "the Declaration does not permit retroactive charging for costs incurred in prior years" but is mum on whether, independently, the charges violated the Declaration. The question whether the Declaration permits Q Club to apply its methodology retroactively simply has no bearing on whether the methodology is legitimate in the first place.

Similarly, it's difficult to see how Dear could have been prejudiced by the district court's instruction. To say that the matter "ha[d] been adjudicated" is perhaps the most neutral way to ensure that the jury was not swayed—either way—by a judgment on an issue that was ultimately irrelevant to the one before it. Indeed, Dear's preferred instruction—that the back-charging issue had been resolved in his favor—could have unduly prejudiced Q Club because, as it explained during the charge conference, the jury might have assumed that "if [Q Club] breached [on the back-charging issue], that automatically entitles [Dear] to damages under the shared cost issue." For these reasons, the district court didn't abuse its discretion in giving such an even-handed, plain-vanilla instruction.

C

Finally, Dear argues that the district court erred in denying his motion for a new trial under Federal Rule of Civil Procedure 59, which was grounded on his assertion that he had unearthed evidence that contradicted Q Club's trial position

on the Shared Costs issue. Specifically, Dear claimed to have found deposition testimony from an unrelated 2010 case in which Andy Williams, Q Club's then-corporate representative, testified, in effect, that the Unit Management Agreement fees cover in-unit housekeeping costs. At the trial in this case, Sergio Pagliery, Q Club's current rep, stated that housekeeping costs are actually part of Shared Costs. Williams's testimony, Dear says, "directly contradicts" Pagliery's, thus warranting a new trial. We disagree.

We review a district court's treatment of a motion for a new trial for an abuse of discretion. *See McGinnis v. Am. Home Mortg. Servicing, Inc.*, 817 F.3d 1241, 1255 (11th Cir. 2016) (citation omitted). "Deference to the district court is particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed." *Id.* (quotations omitted). We have made clear that "[m]otions for a new trial based on newly discovered evidence are highly disfavored" and "should be granted only with great caution." *United States v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006) (en banc) (quotation omitted). To warrant a new trial, Dear bears the heavy burden of showing

> that (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result.

United States v. Jernigan, 341 F.3d 1273, 1287 (11th Cir. 2003) (quoting *United States v. Ramos*, 179 F.3d 1333, 1336 n.1 (11th Cir. 1999)).

Dear hasn't met his burden here. Even if Dear's failure to find this evidence previously wasn't for want of diligence, the new evidence wouldn't "probably produce a different result" at a new trial. *Id.* As the district court recognized, this "new" evidence "does not actually contradict the trial evidence on housekeeping costs" at all. Among other problems, Williams's testimony concerned Shared Costs as they were calculated using the old methodology. Accordingly, what Williams said in 2010 has no bearing on—and certainly doesn't contradict—Pagliery's testimony, which described Q Club's practice after it changed its methodology in 2013. The district court was well within its discretion to deny Dear's motion for a new trial on this ground.

IV

To recap, we hold (1) that the district court properly concluded that the Declaration doesn't permit back-charging, (2) that the district court didn't reversibly err in submitting the Shared Costs issue to the jury or in the way that it instructed the jury, and (3) that Dear hasn't met his burden for requesting a new trial because the "new" evidence wouldn't likely produce a different result.

AFFIRMED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10157

D.C. Docket No. 1:15-cv-01422-AT

LUXOTTICA GROUP, S.p.A.,
an Italian corporation,
OAKLEY, INC.,
a Washington corporation,

Plaintiffs - Appellees
Cross Appellants,

versus

AIRPORT MINI MALL, LLC,
a Georgia limited liability company,
d.b.a. Old National Discount Mall,
YES ASSETS, LLC,
a Georgia limited liability company,
CHIENJUNG YEH,
a.k.a. Jerome C. Yeh,
DONALD C. YEH,
individually,
JENNY YEH,
ALICE JAMISON,

Defendants - Appellants
Cross Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(August 7, 2019)

Before WILSON, JILL PRYOR and TALLMAN,[*] Circuit Judges.

JILL PRYOR, Circuit Judge:

Luxury eyewear manufacturers holding registered trademarks brought a contributory trademark infringement action under the Lanham Act against owners of a discount mall whose subtenants were selling counterfeit eyewear. At trial, the jury returned a verdict in the plaintiffs' favor. After careful review and with the benefit of oral argument, we conclude that none of the issues the defendants raise on appeal demonstrates reversible error, so we affirm the jury's verdict.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Luxottica Group, S.p.A. and its subsidiary Oakley, Inc. (collectively and individually "Luxottica") manufacture and sell luxury eyewear and own registered trademarks for the Ray-Ban and Oakley brands. Defendants Jerome and Jenny Yeh own defendant Yes Assets, LLC. In 2004, Yes Assets purchased the Old National Village Shopping Center in College Park, Georgia.

[*] Honorable Richard C. Tallman, United States Circuit Judge for the Ninth Circuit, sitting by designation.

The Shopping Center included about 30 store fronts as well as an approximately 79,000-square-foot indoor space (the "Mall"), which contained between 120 and 130 booths to lease to individual vendors. Defendant Alice Jamison, the Yehs' daughter, managed the Shopping Center. Her responsibilities included reviewing leases, collecting rent, and visiting the Shopping Center and Yes Assets' tenants, including the lessee of the Mall.

Until December 1, 2009, Yes Assets leased the Mall to a tenant, who assigned it to a subtenant, who subleased it to former Georgia congressman Pat Swindall, who in turn subleased the booths to vendors. From December 1, 2009 forward, Yes Assets leased the Mall to defendant Airport Mini Mall, LLC ("AMM"), a company Jerome and Jenny created and later gave to their son, defendant Donald Yeh, and the Mall became known as the International Discount Mall, AMM's tradename. Under the lease agreement, Yes Assets provided AMM and its subtenants (the vendors in the 120 to 130 booths) with a variety of services—including lighting, water, sewerage, maintenance and repairs, painting, and cleaning—and a parking area for customers. Greg Dickerson, whom Jerome hired as AMM's property manager, subleased the booths to vendors and reported to Jamison and Jerome until 2013, when Jerome had a stroke, and to Jamison and Donald afterward.

AMM's tenure as the Mall's landlord saw three law enforcement raids there, during which officers executed search warrants, arrested subtenants, and seized alleged counterfeits of Luxottica eyewear and other brands' products. After the first raid, law enforcement left a copy of the search warrant and a list of items seized, including eyewear bearing Luxottica's marks, at the raided booth. The second raid lasted more than 14 hours and involved approximately 30 federal and local law enforcement agents who shut down the Mall to execute search warrants, arrested subtenants for selling counterfeit goods, seized thousands of counterfeit items bearing Luxottica's marks, and loaded the items onto a tractor-trailer parked in front of the Shopping Center. Dickerson witnessed the second raid from the Shopping Center's parking lot and notified Jamison, Donald, and Jerome and Jenny's attorney, Louis Bridges. Dickerson later walked through the Mall to compile a list of the booths where law enforcement had seized goods and informed Jamison, Jerome, and Bridges about his inquiries of subtenants regarding the raid and whether they were selling counterfeit items. Each subtenant denied selling counterfeit merchandise, but Jamison admitted that she would expect the subtenants to lie if they were selling counterfeit goods. On Bridges' advice, the defendants decided to take no action against the subtenants unless the subtenants were convicted of a crime. More than a year after Luxottica filed this lawsuit,

police executed several more search warrants at the Mall and seized additional counterfeit items bearing Luxottica's marks.

Luxottica twice sent letters notifying the defendants that their subtenants were not authorized to sell Luxottica's eyewear and that any mark resembling Ray-Ban or Oakley marks would indicate that the glasses were counterfeit. The second letter also identified specific booths Luxottica suspected of selling counterfeit eyewear. Jamison and Donald were aware of both letters. Dickerson visited the booths named in the second letter but made no attempt to determine whether those vendors' eyewear products were counterfeit or to terminate their leases. After Luxottica filed this lawsuit, Jamison and Bridges attended a meeting at the College Park Police Department to discuss the unlawful selling of counterfeit products at the Mall.

Despite the raids, letters, and meeting with law enforcement, the defendants took no steps to evict the infringing subtenants; they even renewed leases with several of the subtenants who had been arrested during the 14-plus-hour raid. In the month leading up to the filing of this lawsuit, Isabel Rozo, an employee of Luxottica's private investigator Geanie Johansen, purchased and photographed $15 and $20 counterfeit Ray-Ban glasses at several booths. Ray-Ban glasses normally retail for $140 to $220 a pair.

Luxottica sued the defendants for contributory trademark infringement under § 32 of the Lanham Act, 15 U.S.C. § 1114. The district court denied the defendants' motions in limine to exclude evidence, except for their second motion, which it granted in part to limit the evidence Luxottica could introduce regarding sales at the Mall of counterfeit non-Luxottica brands and counterfeit sales that occurred before AMM took over as the Mall's landlord. After an 11-day trial, the jury returned a special verdict holding all defendants except Jenny liable for contributory trademark infringement and assessing $100,000 in damages for each infringed trademark, totaling $1.9 million in damages. Having moved for judgment as a matter of law after the close of all the evidence, the defendants renewed their motion, which the district court denied.

The defendants appeal the jury verdict, a portion of the district court's instructions to the jury regarding the application of Georgia landlord-tenant law, and the district court's denials of their motions in limine and renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b).[1]

[1] The defendants appeal the denial of their first motion for judgment as a matter of law made under Rule 50(a), but because the only way to preserve a Rule 50(a) motion is to renew it under Rule 50(b), we review only the denial of their renewed motion under Rule 50(b). The defendants also appeal the district court's submission to the jury of the amount of statutory damages to be awarded. Because they make no argument about the statutory damages issue in their briefs on appeal, however, we deem it abandoned. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). We grant the defendants' motion to dismiss the cross-appeal because Luxottica has abandoned it.

II. STANDARDS OF REVIEW

We review *de novo* questions of law, such as the legal standard for liability for contributory trademark infringement. *U.S. Sec. & Exch. Comm'n v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 795 (11th Cir. 2015). We also review *de novo* a district court's denial of a Rule 50(b) motion. *Id.* at 813. "Judgment as a matter of law is appropriate only if the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict." *Equal Emp't Opportunity Comm'n v. Exel, Inc.*, 884 F.3d 1326, 1329 (11th Cir. 2018) (internal quotation marks omitted), *cert. denied*, 139 S. Ct. 1373 (2019). "We consider all the evidence, and the inferences drawn therefrom, in the light most favorable to the nonmoving party." *Id.* (internal quotation marks omitted). "We will not second-guess the jury or substitute our judgment for its judgment if its verdict is supported by sufficient evidence." *Id.* (internal quotation marks omitted).

Orders denying motions in limine are reviewed for abuse of discretion. *Kropilak v. 21st Century Ins. Co.*, 806 F.3d 1062, 1067 (11th Cir. 2015). Under that standard, we will reverse a district court's ruling "only if the court applie[d] an incorrect legal standard, follow[ed] improper procedures in making the determination, or ma[d]e[] findings of fact that are clearly erroneous." *Id.* (internal

quotation marks omitted). The movant must also establish "substantial prejudicial effect." *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1276 (11th Cir. 2008).

This Court reviews jury instructions *de novo* to determine whether they "misstate the law or mislead the jury to the prejudice of the objecting party." *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1285 (11th Cir. 2014) (internal quotation marks omitted). Although our review is *de novo*, we will reverse based on a district court's jury instructions "only where we are left with a substantial and ineradicable doubt as to whether the district court properly guided the jury." *Id.* (internal quotation marks omitted).

III. DISCUSSION

We affirm the district court on each issue appealed. The district court (1) correctly determined that the evidence was sufficient—even under the legal standard the defendants urge us to adopt—to support the jury's verdict finding the defendants liable for contributory trademark infringement; (2) committed no reversible error in instructing the jury; (3) correctly determined that the evidence was sufficient to support the jury's verdict on each defendant's individual liability; and (4) did not abuse its discretion in the challenged evidentiary rulings.

A. Luxottica Presented Sufficient Evidence to Sustain the Jury's Verdict on Contributory Trademark Infringement.

Under the Lanham Act, the owner of a registered trademark may hold someone contributorially liable for trademark infringement if that person induces

or knowingly facilitates the infringement. The defendants argue that the district court should have followed the reasoning of a Second Circuit case that they believe imposed a tougher knowledge requirement for contributory trademark infringement claims. Under that court's reasoning, the defendants argue, the evidence was insufficient to prove that they had the requisite knowledge of, or demonstrated willful blindness to, their subtenants' direct infringement. We disagree and affirm the district court's denial of the defendants' Rule 50(b) motion. First, we explain the elements of the contributory trademark infringement cause of action. Second, because the defendants do not contest that landlords may be held contributorially liable for their (sub)tenants' direct trademark infringement, we assume without deciding that contributory liability for trademark infringement extends to the landlord-tenant context. Third, we resolve the defendants' argument about the proper legal standard by assuming without deciding that liability for contributory trademark infringement requires that the defendant have knowledge of specific acts of direct infringement. Even under this standard, the evidence was sufficient to support the jury's verdict because the defendants had at least constructive knowledge of their subtenants' direct infringement.

1. Contributory Liability Under the Lanham Act

The contributory trademark infringement cause of action stems from the application of "basic tort liability concepts to determine the scope of liability"

under the Lanham Act. *Duty Free Americas, Inc. v. Estée Lauder Cos.*, 797 F.3d 1248, 1276 (11th Cir. 2015) (internal quotation marks omitted).[2] The Supreme Court first acknowledged the existence of this cause of action in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982). In that case, manufacturers had supplied pharmacists with a generic version of a drug whose brand name was trademarked. *Id.* at 846-48. Some pharmacists had infringed the brand name manufacturer's mark by mislabeling bottles containing generic capsules as containing brand name capsules. *Id.* at 848-51, 854. But instead of suing the infringing pharmacists, the brand name manufacturer sued the generic manufacturers, *id.* at 846-47, 849-51, prompting the Supreme Court to recognize in the Lanham Act a cause of action for contributory infringement: "if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit." *Id.* at 854.[3]

[2] The plain text of § 32 of the Lanham Act prohibits only direct infringement: a person may not "use" or "reproduce, counterfeit, copy, or colorably imitate a registered mark . . . in connection with the sale . . . of goods or services" if such use "is likely to cause confusion." 15 U.S.C. § 1114(1).

[3] The Supreme Court ultimately ruled in the generic manufacturers' favor, holding that the Court of Appeals should not have disturbed the district court's findings that the generic

A claim for contributory trademark infringement thus has two elements: (1) a person or entity commits direct trademark infringement under the Lanham Act; and (2) the defendant (a) "intentionally induces" the direct infringer to commit infringement, (b) supplies a "product" to the direct infringer whom it "knows" is directly infringing (actual knowledge), or (c) supplies a "product" to the direct infringer whom it "has reason to know" is directly infringing (constructive knowledge). *See id.* The defendants do not challenge the first element—the jury's finding of direct infringement by their subtenants. As to the second element, Luxottica proceeded on a knowledge rather than an intentional inducement theory, so only the actual and constructive knowledge prongs of the second element are at issue in this appeal.

In support of its theory that the defendants had at least constructive knowledge of their subtenants' infringement, Luxottica presented evidence tending to show that the defendants exhibited willful blindness to the subtenants' unlawful conduct. Across the circuits, a consensus has developed that willful blindness is one way to show that a defendant had constructive knowledge in cases of contributory trademark infringement. *See Coach, Inc. v. Goodfellow*, 717 F.3d 498, 503, 505 (6th Cir. 2013); *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 109-10

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manufacturers had not "suggested, even by implication, that pharmacists should dispense generic drugs incorrectly identified as" the brand name drug. *Inwood*, 456 U.S. at 852, 856-58.

(2d Cir. 2010); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265 (9th Cir. 1996); *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1149, 1151 n.5 (7th Cir. 1992); *see also United States v. Baxter Int'l, Inc.*, 345 F.3d 866, 902 (11th Cir. 2003) (holding, in the context of the Medicare Secondary Payer statute, that "[a] party that willfully blinds itself to a fact . . . can be charged with constructive knowledge of that fact"). Willful blindness occurs when a person "suspect[s] wrongdoing and deliberately fail[s] to investigate." *Hard Rock Cafe*, 955 F.2d at 1149. We agree with the other circuits that willful blindness is a form of constructive knowledge for contributory trademark infringement. We evaluate the strength of Luxottica's evidence regarding willful blindness and constructive knowledge in Part III.A.3.

2. Landlord Liability for Contributory Trademark Infringement

Whether contributory liability for trademark infringement extends to the landlord-tenant context is a question of first impression for this Court. The defendants in *Inwood* supplied the very product the direct infringers mislabeled with the plaintiff's trademark. 456 U.S. at 846-50. In contrast, the defendants in this case supplied services and support—such as space, utilities, maintenance, and parking—that facilitated the direct infringers' sale of counterfeit goods. In this case, the defendants do not contest that *Inwood*'s contributory trademark infringement cause of action may be applied to the landlord-tenant context. We

therefore assume without deciding that a landlord may be contributorially liable for its (sub)tenants' direct trademark infringement if the landlord intentionally induces the infringement *or* knows or has reason to know of the infringement while supplying a service (such as space, utilities, or maintenance) that facilitates it.[4]

3. The Evidence Was Sufficient to Prove That the Defendants Had at Least Constructive Knowledge of Specific Acts of Infringement.

Pursuing a knowledge theory of contributory trademark infringement, Luxottica sought to prove that the defendants knew or had reason to know that their subtenants were selling counterfeit items yet continued to supply services (space, utilities, maintenance, and parking) that enabled the subtenants to sell their goods. The question that arises—another one of first impression for this Court—is whether the knowledge theory of contributory liability requires the plaintiff to prove that the defendant had actual or constructive knowledge of *specific* infringing acts. We need not answer this question, however, because even if

[4] We note that three circuits have applied *Inwood* to owners of flea markets whose tenants sold counterfeit goods. *See Hard Rock Cafe*, 955 F.2d at 1148-49; *Fonovisa*, 76 F.3d at 265 (citing *Hard Rock Cafe*); *Coach*, 717 F.3d at 503-04 (citing *Hard Rock Cafe* and *Fonovisa*). Such a result is also consistent with the general tort liability principles upon which *Inwood*'s analysis rested. *See Duty Free Americas*, 797 F.3d at 1276 ("[T]he Lanham Act is derived generally and purposefully from the common law tort of unfair competition . . . . In construing the Act, then, courts routinely have recognized the propriety of examining basic tort liability concepts to determine the scope of liability." (internal quotation marks omitted)); *see also* Restatement (Second) of Torts § 877(c) (Am. Law Inst. 1979) (June 2019 Westlaw update) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously."); *id.* cmt.d.

liability for contributory trademark infringement requires the defendant to have knowledge of specific acts of direct infringement, the evidence in this case was sufficient for a reasonable jury to find that the defendants had at least constructive knowledge of (or were willfully blind to) specific acts of direct infringement by their subtenants.

The defendants argue that the district court should have applied what they deem a stricter standard from *Tiffany (NJ) v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010), in ruling on their renewed motion for judgment as a matter of law. In *Tiffany*, the jewelry titan sued the online listing service eBay for contributory trademark infringement because vendors listed counterfeit Tiffany products for sale on eBay's website. *Id.* at 96-97. Whenever Tiffany notified eBay of a direct infringer's identity, eBay delisted the vendor within 24 hours. *Id.* at 99. But, by itself, eBay was unable to identify and block each direct infringer, even with 200 employees focused on that task, because its website contained 100 million listings, and eBay lacked the ability to inspect goods in person and the expertise to distinguish Tiffany products from non-Tiffany products. *Id.* at 97-98. "For contributory trademark infringement liability to lie," the Second Circuit held, "a service provider must have more than a general knowledge or reason to know that its service is being used to sell counterfeit goods. Some contemporary knowledge of which particular listings are infringing or will infringe in the future is

necessary." *Id.* at 107. Because Tiffany's demand letters identified no additional sellers of counterfeit goods other than the sellers eBay had already delisted, eBay lacked actual or constructive knowledge of the remaining direct infringers. The court thus upheld the bench trial verdict in favor of eBay. *Id.* at 96, 109.

The defendants articulate *Tiffany*'s legal standard for contributory trademark infringement as whether "Plaintiffs provide[d] notice to Defendants that a particular seller was then selling counterfeit versions of Plaintiffs' product." Appellants' Initial Br. at 22 (internal quotation marks omitted). The defendants err, though, in asserting that *Tiffany* narrowed the sources of a defendant's actual or constructive knowledge to just one: notice by the trademark holders. *Tiffany* did not categorically shift the burden onto trademark holders to provide notice to defendants; it simply clarified that certain facts of the case—a marketplace of 100 million listings and eBay's inability to inspect goods in person and lack of expertise to distinguish Tiffany from non-Tiffany jewelry—made it unlikely that eBay could identify the infringing vendors on its own, without help from Tiffany. *Tiffany*, 600 F.3d at 97-98, 109. In arguing that it was Luxottica's burden to notify the defendants of the infringing subtenants' identities, the defendants fail to acknowledge that actual or constructive knowledge of the direct infringers' identities could arise from many sources, including steps the defendants could have taken to investigate alleged direct infringement at the Mall after being put on

notice by Luxottica that unnamed subtenants' may have been selling counterfeit Luxottica products.

In any event, we need not decide today whether a defendant must be found to have had knowledge of specific acts of direct infringement for contributory liability to attach. Even if specific knowledge is necessary, the trial evidence was sufficient to prove that the defendants had at least constructive knowledge of specific instances where their subtenants infringed Luxottica's marks. Unlike in *Tiffany*, the defendants here did not need Luxottica's help to identify the infringing subtenants. Although *Inwood* created "no affirmative duty to take precautions against the sale of counterfeits," *Hard Rock Cafe*, 955 F.2d at 1149, the jury reasonably could have found that Luxottica's notice letters would have prompted a reasonable landlord to do at least a cursory visual inspection of the Mall's 130 booths to determine which vendors displayed eyewear with Luxottica's marks and sold it at prices low enough—$15 or $20 a pair for glasses that typically retail at $140 to $220 a pair—to alert a reasonable person that it was counterfeit.[5] Similarly, the jury reasonably could have found that a cursory visual inspection of 130 booths to see if they displayed what appeared to be counterfeit Luxottica

[5] One of Luxottica's witnesses acknowledged that there is a legitimate secondary market for Ray-Ban and Oakley eyewear, so the statements in Luxottica's letters that the Mall's tenants were unauthorized retailers were of limited use to the defendants. Nevertheless, the jury reasonably could have found that the defendants knew or should have known that $15 and $20 eyewear bearing Ray-Ban trademarks was counterfeit.

eyewear was not so burdensome as to relieve the defendants of the responsibility to investigate after being informed by Luxottica that unnamed subtenants may have been engaging in illegal activity.

What's more, previously we have held that evidence of "serious and widespread" infringement makes it more likely that a defendant knew about the infringement. *Mini Maid Servs. Co. v. Maid Brigade Sys., Inc.*, 967 F.2d 1516, 1522 (11th Cir. 1992). The three law enforcement raids—one of which lasted over 14 hours and required a tractor-trailer to haul away the seized merchandise—evidenced "serious and widespread" violations that gave the defendants at least constructive knowledge that their subtenants were selling counterfeit goods. *Id.* After the 14-plus-hour raid, Dickerson, the defendants' property manager, walked through the Mall; compiled a list of booths where law enforcement had seized goods; and informed Jerome, Jamison, and Bridges about his conversations with subtenants regarding the raid and whether they were selling counterfeit products. The record evidence of (1) the raids, arrests, and seizures, (2) the meeting at the College Park Police Department Jamison and Bridges attended where they discussed the sale of counterfeit goods at the Mall, and (3) the defendants' ability to visually inspect the approximately 130 booths was, taken together, sufficient to support a jury finding that the defendants had at least constructive knowledge of,

or were willfully blind to learning, which subtenants were directly infringing Luxottica's trademarks.

In sum, evidence of the defendants' knowledge of specific infringing acts by subtenants who relied on the services the defendants provided (including space, utilities, and maintenance) amply supported the jury verdict. The district court did not err in denying the defendants' Rule 50(b) motion.

B. The District Court Made No Reversible Error in Instructing the Jury.

The defendants take issue with two of the district court's instructions to the jury. We discern no reversible error in either one.

First, the defendants protest the district court's instruction to the jury that Georgia law permits landlords to evict commercial tenants without resort to legal proceedings where the tenant has contractually waived its right to those procedural protections. *See Rucker v. Wynn*, 441 S.E.2d 417, 419 (Ga. Ct. App. 1994), *disapproved on other grounds by George v. Hercules Real Estate Servs., Inc.*, 795 S.E.2d 81, 89 (Ga. Ct. App. 2016). The defendants contend that *Rucker* is inapposite because in that case, the tenant's nonpayment of rent constituted a clear default under the lease. *Rucker*, 441 S.E.2d at 419. But here, the defendants assert, they lacked clear evidence of their subtenants' defaults. They argue that without clear evidence of their subtenants' defaults, they could have been sued for

wrongful eviction had they attempted "to use self-help to evict [their] [sub]tenants." Appellants' Initial Br. at 46.

Yet the defendants' contention that they lacked clear evidence of their subtenants' defaults belies the evidence presented at trial and ignores the provisions in AMM's subleases that would have permitted the defendants to evict infringing subtenants. AMM's standard sublease agreement provided that a "[v]erified written complaint[]" that a subtenant was selling counterfeit goods would constitute an "immediate breach" of the lease and authorize AMM to dispossess the subtenant "immediately." Doc. 162-12 at 21.[6] Bridges, Jerome and Jenny's counsel, acknowledged at trial that a search warrant accompanied by a sworn affidavit would qualify as a "[v]erified written complaint[]."[7] *Id.* The jury reasonably could have found that the defendants could have sought copies of search warrants executed during the raids—one of which was left at the booth targeted by the first raid—to obtain proof of their subtenants' defaults.

Even if law enforcement had refused to provide copies of the search warrants, the defendants had another tool at their disposal. AMM's standard sublease agreement also provided that a subtenant's failure to comply with trademark law would constitute a default on the sublease. Thus, the jury

[6] "Doc. #" refers to the numbered entry on the district court's docket.

[7] Bridges did not represent the defendants at trial.

reasonably could have found that the defendants could have photographed the booths displaying counterfeit Luxottica-brand eyewear for sale—just as Rozo, the employee of Luxottica's private investigator Johansen, did—which would have assisted the defendants in establishing that their subtenants were in breach of their subleases. Upon a subtenant's first default under the sublease agreement, AMM could evict the subtenant and retake possession of the booth after providing five days' notice; no notice was necessary for a subsequent default.

Likewise, Yes Assets' lease with AMM required AMM to "comply with all applicable laws," and failure to do so would constitute a default on the lease, entitling Yes Assets to terminate the lease and immediately assume possession of the Mall. Doc. 162-9 at 7, 31. AMM's continued provision of services to the infringing subtenants despite having at least constructive knowledge of their infringement violated the Lanham Act. *See* Part III.A.3. In turn, AMM's continuing support of infringing subtenants put it in default of its lease with Yes Assets and gave Yes Assets grounds to terminate the lease and dispossess AMM.

As part of their contention that they lacked clear evidence of their subtenants' breaches of the subleases, the defendants further argue that Luxottica's notice letters were nothing more than unsubstantiated hearsay insufficient to provide clear evidence of breaches. We reject this argument as well. For one thing, the defendants never objected at trial to the letters' admission. For another,

the letters were admissible for their effect on the recipient, not for the truth of the matter asserted, so they were not hearsay. Fed. R. Evid. 801(c). And even without these letters, the jury reasonably could have found that the search warrants or photographs of counterfeit eyewear on display would have provided the defendants with clear evidence of their subtenants' breaches of their subleases.

Second, the defendants protest the district court's instruction that the jury could find that the defendants had the ability to control their subtenants' activities in the Mall if "Airport Mini Mall, LLC, Yes Assets, LLC, Jerome Yeh, Jenny Yeh, Donald Yeh, ***and/or*** Alice Jamison possessed the right, ability[,] or authority to control either (i) the use of the physical retail space that it rented at the Discount Mall, or (ii) the activities that any of its vendors could engage in while occupying such space at the Discount Mall." Doc. 155 at 17 (emphasis added). Essentially, the defendants object on appeal to the district court's use of "and/or." The defendants easily could have requested that the district court fix this conjunction, but they forfeited this objection by failing to raise it to the district court. Even if they had preserved it, however, the district court's instruction was not reversible error. Although AMM was the Mall's sole landlord, a corporation may act only through its agents. *See United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1271 (11th Cir. 2009). The district court's instructions could have been more precise by explaining, based on our above descriptions of AMM's standard sublease

agreement and Yes Assets' lease with AMM, that (1) Jerome, Jenny, and Donald were agents of AMM with the power to evict infringing subtenants; and (2) Yes Assets and its manager Jamison could have evicted AMM for failing to evict the infringing subtenants. But without any "substantial and ineradicable" sense that the district court's imprecise instruction misled the jury or prejudiced the defendants, we will not reverse. *Bhogaita*, 765 F.3d at 1285.

We find no reversible error in either of the challenged jury instructions.

C. The Evidence Was Sufficient to Support the Jury's Verdict on the Individual Defendants' Liability for Contributory Infringement.

The defendants contest the sufficiency of the evidence supporting the jury's verdict holding Jerome, Donald, and Jamison individually liable for contributory trademark infringement. Construing the evidence in the light most favorable to Luxottica, as we must in reviewing the denial of the defendants' Rule 50(b) motion, *Exel*, 884 F.3d at 1329, we conclude that the evidence was sufficient to show that these three defendants had at least constructive knowledge of direct infringement by subtenants who relied on the services they provided.

Jerome was copied on e-mails between Swindall, who leased the Mall from Yes Assets up until December 2009, and the College Park Police Department regarding alleged sales of counterfeit goods at the Mall in 2008. The jury could infer from Swindall's testimony that these e-mails would have put a reasonable landlord on notice to watch out for sales of counterfeit goods, including goods

bearing Luxottica's marks. Jerome was also informed about Dickerson's conversations with subtenants after the 14-plus-hour raid that took place during AMM's tenure as the Mall's landlord. Donald admitted he knew about Luxottica's notice letters and widespread sales of counterfeit merchandise. And Jamison, who managed the Shopping Center, knew about Luxottica's notice letters and at least one of the raids and attended a meeting at the College Park Police Department after this lawsuit was filed to discuss the sale of counterfeit products at the Mall.[8]

D. The District Court Did Not Abuse Its Discretion in Its Evidentiary Rulings.

The defendants appeal five sets of the district court's evidentiary rulings. We conclude that the district court did not abuse its discretion in any of these rulings. First, the defendants argue that the district court abused its discretion in admitting the testimony of and counterfeit eyewear obtained by Rozo, an employee of Johansen, who was the investigator Luxottica hired to make undercover

[8] The defendants argue that Luxottica failed to pierce the corporate veil under Georgia law and show that the individual defendants were the "moving, active, conscious force[s]" behind their subtenants' infringement. Appellants' Initial Br. at 55 (internal quotation marks omitted). But Luxottica needed to prove only the elements of contributory trademark infringement: (1) direct infringement by a third party and (2) *either* intentionally inducing the direct infringement *or* providing a product or service to the direct infringer despite having actual or constructive knowledge of the direct infringement. The evidence was sufficient to support the jury's finding that Luxottica established both elements as to Jerome, Donald, and Jamison. Piercing the corporate veil is irrelevant to proving individual contributory liability, as is demonstrating that the defendants were the "moving, active, conscious force[s]" behind their subtenants' infringement, which is the standard for imposing individual liability for *direct*, not *contributory*, infringement. *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477-78 (11th Cir. 1991) (internal quotation marks omitted).

purchases and take photographs of counterfeit eyewear at the Mall. They assert that Rozo's testimony was unduly prejudicial because the destruction of her contemporaneous notes hindered both her ability to give reliable testimony and their ability to cross-examine her.[9] We reject the defendants' contention because the e-mails Rozo sent to Johansen within 24 hours of her visits to the Mall provided a near-contemporaneous account, and we have found no case holding that destruction of a witness's contemporaneous notes—especially when not done in bad faith—requires the harsh sanction of complete exclusion of the witness's testimony. Excluding evidence as unduly prejudicial under Federal Rule of Evidence 403 "is an extraordinary remedy [that] should be used sparingly," and, in applying the rule, "courts must look at the evidence in a light most favorable to admission." *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1069 (11th Cir. 2014) (internal quotation marks omitted). We are hard-pressed to say that any "unfair prejudice" caused by Rozo's testimony and the admission into evidence of the eyewear she obtained and the photographs she took at the Mall "substantially

[9] Luxottica argues that the defendants failed to preserve their objection to the admission of Rozo's testimony and the eyewear she purchased at the Mall. Because we conclude that the district court did not abuse its discretion in admitting this evidence, we need not decide whether the defendants preserved this objection or, if not, whether the district court committed plain error.

The defendants have abandoned the argument they made to the district court about spoliation of evidence because they make no such argument in their briefs on appeal. *See Sapuppo*, 739 F.3d at 681.

outweighed" their "probative value." Fed. R. Evid. 403. Moreover, the defendants were able to use cross-examination to undermine Rozo's testimony and that of another Luxottica witness by demonstrating that these witnesses could not determine whether the counterfeit eyewear and photos of counterfeit eyewear displayed for sale that were presented to the jury came from the defendants' mall or a different mall.

Second, the defendants protest the district court's rearrangement of Exhibit 646, a collection of counterfeit glasses Rozo purchased at the Mall and the bags associated with each pair of glasses.[10] As we understand it, shortly after Rozo purchased each pair of glasses, she placed them in plastic bags and affixed stickers showing the number of the booth that sold her the glasses.[11] During the trial, three witnesses handled the exhibit, and somehow the glasses got placed into the wrong bags.[12] When counsel for both sides were unable to agree on how to restore the

[10] Luxottica argues that the defendants also failed to preserve their objection on this issue. Again, because we determine that the district court did not abuse its discretion in rearranging the exhibit, we need not decide whether the defendants preserved this objection or, if not, whether the district court committed plain error.

[11] The record leaves unclear whether Rozo or Mall vendors supplied the bags. In addition, the trial transcript suggests that Rozo was inconsistent about putting the stickers on the glasses versus the bags, and she also testified that the stickers sometimes fell off, both of which may have contributed to the glasses becoming disassociated from their bags.

[12] Rozo handled the exhibit first, then Johansen, then Luxottica's director of intellectual property for the Americas. Twice—during Johansen's testimony and after the director's testimony—it emerged that the glasses were no longer in the proper bags, but it is unclear how this happened. To resolve this issue, we need not determine how the glasses became separated from their proper bags.

exhibit, the district court rearranged the exhibit's contents outside of the presence of the jury and counsel to ensure that each pair of glasses was placed in the correct bag before making the exhibit available to the jury for its deliberations. Citing no authority, the defendants argue that determining the proper relationship between the glasses and the bags was a job for the jury, not the judge. We conclude that the district court did not abuse its discretion in rearranging the exhibit because trial judges retain discretion "to enable the jury to hear [and examine] the evidence in a clear, orderly and methodical manner." *United States v. Watson*, 466 F.2d 549, 550 (5th Cir. 1972).[13] And even if the district court abused its discretion in reorganizing the exhibit outside of the presence of the jury and counsel, the defendants do not argue that the district court reorganized the exhibit erroneously or in a way that prejudiced them, so any error was harmless. *See* 28 U.S.C. § 2111; Fed. R. Civ. P. 61.

Third, the defendants object to the admission of evidence of supposed counterfeit sales that took place before AMM's assumption of the Mall's lease, arguing that this evidence was irrelevant and unduly prejudicial. But evidence of "serious and widespread" sales of counterfeit goods increases the likelihood that the defendants knew about and failed to stop the infringement of Luxottica's

[13] Decisions of the former Fifth Circuit rendered before the close of business on September 30, 1981 are binding on this Court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

marks. *See Mini Maid*, 967 F.2d at 1522. Apart from Swindall's testimony, which we address below, the only other evidence of pre-December 2009 counterfeit sales that the defendants challenge is Luxottica's questioning of Jamison and Dickerson regarding what they knew about alleged infringement at the Mall before AMM's assumption of the lease. To lay an evidentiary foundation for the defendants' knowledge of pre-December 2009 counterfeit sales, the district court permitted Luxottica to cross-examine the individual defendants on this topic. When Jamison and Dickerson denied knowledge of the pre-December 2009 allegations, Luxottica ended these lines of questioning. Given the limited questions posed to Jamison and Dickerson, we disagree that any prejudice introduced by these questions "substantially outweighed" their significant "probative value." Fed. R. Evid. 403.

Fourth, the defendants object to the admission of evidence of alleged infringement of non-Luxottica brands, arguing that this evidence was also irrelevant and unduly prejudicial because Luxottica failed to show that the non-Luxottica goods were actually counterfeit. Yet the jury reasonably could have inferred that even mere allegations of counterfeit sales of non-Luxottica products should have alerted the defendants to watch out for infringement of Luxottica's brands, so this evidence was relevant to the jury's determination of liability. Further, in ruling on the defendants' second motion in limine, the district court required Luxottica to ensure that the evidence of infringement of non-Luxottica

products did not outweigh the evidence it presented of infringement of its own products. The defendants make no argument that the evidence of infringement of non-Luxottica brands predominated over evidence of infringement of Luxottica brands. In addition, the district court gave the jury a limiting instruction that it could not find the defendants liable based solely on evidence of alleged infringement of other brands, a straightforward instruction "that the jury could easily understand and take to heart." *United States v. Mateos*, 623 F.3d 1350, 1365 (11th Cir. 2010). "We presume that a jury follows the instructions given to it by the district court," and the defendants "ha[ve] offered nothing to rebut this presumption." *Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1201 (11th Cir. 2004) (internal quotation marks omitted). Because the defendants have not demonstrated their entitlement to the "extraordinary remedy" of exclusion of all evidence of infringement of other brands under Federal Rule of Evidence 403, the district court did not abuse its discretion in admitting this evidence. *Aycock*, 769 F.3d at 1069 (internal quotation marks omitted).

Fifth, the defendants object to the testimony from Swindall, the Mall's landlord prior to December 2009, because Luxottica failed to name Swindall in the pretrial witness list as a rebuttal witness and, according to the defendants, his testimony was irrelevant and unduly prejudicial. Neither reason persuades us. "Rebuttal witnesses are a recognized exception to all witness disclosure

requirements," *United States v. Windham*, 489 F.2d 1389, 1392 (5th Cir. 1974), and "[t]he trial judge has broad discretion in determining whether to admit evidence and witnesses not included in pretrial orders," *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. Unit A 1980); *see also Travelers Ins. Co. v. Dykes*, 395 F.2d 747, 749 (5th Cir. 1968) ("Much considered and wise discretion must be accorded to a district judge as [s]he deals with the infinite variables of evidence."). Swindall testified regarding e-mails between law enforcement and himself, on which Jerome was copied, about a raid that took place before the defendants took over as the Mall's landlord. As the district court recognized, Swindall's testimony and the e-mails were probative of Jerome's (and possibly other defendants') actual or constructive knowledge of the infringement of Luxottica's marks after AMM became the Mall's landlord—an important element of Luxottica's claim that Jerome and other defendants were contributorially liable. And the district court limited Swindall's testimony to the e-mails and any conversations he had with Jerome about the e-mails. Given the district court's wide discretion regarding evidentiary matters, the probative value of Swindall's testimony to Luxottica's case, and the limited nature of his testimony, we conclude that the district court committed no abuse of discretion in permitting him to testify.[14]

[14] Although the defendants repeatedly emphasize that Swindall had previous perjury convictions, they cite no authority suggesting that the district court had to exclude his testimony based on that fact. *See United States v. Swindall*, 971 F.2d 1531, 1534 (11th Cir. 1992). The

We affirm the district court's rulings on each evidentiary issue that the defendants appeal.

IV. CONCLUSION

The evidence was sufficient to support the jury's verdict holding the defendants liable for contributory trademark infringement under the Lanham Act. Concluding that the district court made no reversible error regarding any of the issues the defendants submit for our review, we affirm.

AFFIRMED.

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district court properly permitted the defendants significant cross-examination regarding Swindall's perjury convictions, as allowed by Federal Rule of Evidence 609(b) where the witness was convicted and released from confinement more than 10 years earlier. The defendants' cross-examination fully informed the jury as to reasons why they might doubt his credibility, and the jury was entitled to assess his credibility as it saw fit. *See J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1366, 1375-76 (11th Cir. 1982) (reinstating jury verdict, despite trial judge's disbelief of witnesses' testimony, because making "credibility choices" is "precisely what juries are for").

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOSEPH E. ABDO; SOCIAL MEDIA, INC.; SOCIAL MEDIA LTD. LLC; and SOCIAL MEDIA, INC. LTD.,

Appellants,

v.

KHALIL ABDO, individually and as a shareholder of SOCIAL MEDIA, INC.; NADA ABDO QUILL; and MARIE ABDO SILVA,

Appellees.

Case Nos. 2D18-2270
2D18-2764

CONSOLIDATED

Opinion filed August 7, 2019.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Steven Scott Stephens, Judge.

Robert E. Biasotti of Biasotti Law, St. Petersburg, for Appellants.

Craig L. Berman of Berman Law Firm, P.A., St. Petersburg, for Appellees.

CASANUEVA, Judge.

Appellants challenge two nonfinal orders entered after the close of evidence in a bench trial involving a dispute between siblings over ownership of certain websites and the income stream from those websites. Appellees claim an ownership

interest in six websites identified in the second amended complaint (the Websites) and entitlement to a portion of the income generated therefrom. They allege that their brother, Appellant Joseph E. Abdo, took sole control of the Websites and has failed to make required payments of income to Appellees.

The first order on appeal, entered on May 18, 2018, imposed a constructive trust over the income from the Websites and enjoined certain actions of Joseph E. Abdo. The second order, entered on June 29, 2018, appointed a trustee, identified the trust assets, and specified the powers of the trustee.[1] On December 21, 2018, this court held that the trial court did not have personal jurisdiction over two defendants, Social Media, Inc. Ltd. and Social Media Ltd. LLC, and thus erred in denying their motion to dismiss. Abdo v. Abdo, 263 So. 3d 141, 151 (Fla. 2d DCA 2018). A final judgment has yet to be entered in this case. We have jurisdiction. See Fla. R. App. P. 9.130(a)(3)(c)(ii).

Because the order imposing constructive trust and the subsequent order appointing trustee exceed the purpose of a constructive trust and the remedy it affords and because the trial court lacked jurisdiction over two of the defendants which the orders seek to enjoin, we are compelled to reverse.

I. PROCEDURAL HISTORY

The parties proceeded to trial on the second amended complaint, which alleged seven causes of action. After the close of evidence, only two causes of action remained: count I for declaratory action and count III for breach of fiduciary duty. Count

[1]An order on trustee's motion for clarification was entered on December 31, 2018.

I, brought by all plaintiffs, sought a declaratory judgment establishing ownership of the Websites. Count III is a shareholder derivative action brought by Khalil Abdo on behalf of Social Media, Inc., alleging that Joseph E. Abdo violated the fiduciary duty owed to Social Media, Inc. and Khalil Abdo, as a shareholder, by transferring the Websites and related merchant accounts to Social Media, Inc. Ltd. and/or Social Media Ltd. LLC without approval or compensation.

In the order imposing constructive trust, the court found for the plaintiffs on count I and declared the ownership of the Websites as follows: legal title and equitable title were separated, legal title was transferred to Social Media, Inc., "and Joseph then transferred legal title to his own company, Social Media Ltd. But every transfer of legal title was subject to the siblings' beneficial interests, which exist to this day." The trial court also found for plaintiffs on count III and "impose[d] a constructive trust on the income from the websites identified in the second amended complaint."

II. ANALYSIS

After careful review, we conclude that the constructive trust imposed by the trial court in the first order is overbroad and unsupported by the trial court's findings, and we conclude that the overreach in the first order is exacerbated by the second order on review, the order appointing trustee.

A. THE FIRST ORDER

We first discuss the posttrial order imposing constructive trust. A constructive trust is a remedy, not an independent cause of action, and thus "it must be imposed based upon an established cause of action." Collinson v. Miller, 903 So. 2d 221, 228 (Fla. 2d DCA 2005); see also Swope Rodante, P.A. v. Harmon, 85 So. 3d 508,

511 (Fla. 2d DCA 2012). As the trial court correctly noted, one such cause of action is breach of fiduciary duty. See Williams v. Standford, 977 So. 2d 722, 730 (Fla. 1st DCA 2008) ("A constructive trust is an equitable remedy available in cases dealing with breaches of fiduciary duty . . . .").

A constructive trust serves two purposes: "to restore property to the rightful owner and to prevent unjust enrichment." Brown v. Poole, 261 So. 3d 708, 710 (Fla. 5th DCA 2018) (quoting Provence v. Palm Beach Taverns, Inc., 676 So. 2d 1022, 1025 (Fla. 4th DCA 1996)). It "is 'constructed' by equity to prevent an unjust enrichment of one person at the expense of another as the result of fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem." Wadlington v. Edwards, 92 So. 2d 629, 631 (Fla. 1957); see also Caryl A. Yzenbaarda, George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees, § 471 (June 2018) ("The constructive trust may be defined as a device used by equity to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.").

We conclude that the order imposing constructive trust is overbroad as to the parties benefiting from it and the entities enjoined by its terms. The trial court created the constructive trust as a remedy for count III, breach of fiduciary duty, stating: "The court finds for plaintiffs on count III and imposes a constructive trust on the income from the websites identified in the second amended complaint." Although the trial court found for the "plaintiffs" on count III, this count was brought only by Khalil Abdo, on behalf of Social Media, Inc., and the beneficiary of the claim is thus Social Media, Inc. See § 607.07401, Fla. Stat. (2017); Provence, 676 So. 2d at 1024 ("A derivative action

is one in which a stockholder seeks to sustain in his own name a right of action existing in the corporation. Accordingly, the corporation is the real party in interest with the stockholder being only a nominal plaintiff." (citation omitted)).

Furthermore, as would later be held in Abdo, 263 So. 3d at 151, the trial court lacked jurisdiction over Social Media, Inc. Ltd. and Social Media Ltd. LLC, the defendants to whom the Websites were allegedly transferred. Because the court had no jurisdiction over Social Media, Inc. Ltd. and Social Media Ltd. LLC, the constructive trust cannot bind those entities or their assets. See Humphrey v. Deutsche Bank Nat'l Tr. Co., 113 So. 3d 1019, 1020 (Fla. 2d DCA 2013) ("[N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree." (alteration in original) (quoting Alger v. Peters, 88 So. 2d 903, 907 (Fla. 1956))).

Likewise, the scope of the trust assets, or res, is overbroad and undefined in the order imposing constructive trust. "The very essence of the remedy of constructive trust is the identification of specific property or funds as the res upon which the trust may be attached." Collinson, 903 So. 2d at 229. It "may be imposed only where the trust res is 'specific and identifiable property,' or can be 'clearly traced in assets of the defendant.' " Frieri v. Capital Inv. Servs., Inc., 194 So. 3d 451, 455 (Fla. 3d DCA 2016) (quoting Bank of Am. v. Bank of Salem, 48 So. 3d 155, 158 (Fla. 1st DCA 2010)). "The remedy is 'an extraordinary one,' subject to the discretion of the court and traditional equitable defenses." Joseph v. Chanin, 940 So. 2d 483, 487 (Fla. 4th DCA 2006) (quoting Collinson, 903 So. 2d at 228).

The constructive trust here is imposed on the income from the Websites, purportedly capturing the Websites' income stream that presently exists and will continue in the future. The order does not specify a dollar amount or calculation for the res, nor does it contain findings of fact tracing the res to assets of defendants the trust seeks to enjoin and over which the court has jurisdiction. More specificity is required, see Frieri, 194 So. 3d at 456 ("Without an identifiable res traceable to CIS's assets upon which a trust might be imposed, Frieri's claim for a constructive trust against CIS must fail."), particularly in this case where the rights of numerous entities are impacted and where full appellate review has been delayed by the procedure used.

B. THE SECOND ORDER

In the second order on appeal, the order appointing trustee, the trial court provided a much more detailed description of the trust res than was provided in the order imposing the trust, which simply referenced "the income from the [W]ebsites." However, rather than narrowly identifying specific property or funds as the trust res, the second order expands the scope of the trust even further, casting a net over unspecified assets of nonparties.

In defining the "trust assets," the order includes, for example, "[i]nternet domains or subdomains referenced directly or indirectly in the Second Amended Complaint"; merchant services accounts, source codes, and computer infrastructure for such domains; "[a]ny asset purchased with monies generated or received by Social Media, Inc. or Social Media Ltd LLC since March 1, 2012"; "[a]ll income received or generated by any domain or subdomain"; "[a]ny asset held by or titled to any third-party in which the Abdo siblings now or at any time since March 1, 2012 held an equitable

interest, including but not limited to Social Media, Inc.; Social Media Ltd. LLC; Social Media Inc. Ltd; or Internacionale de Communicanes Mundial ('IDCM')";[2] "[a]ny asset of any Defendant or third-party insider that has been acquired or leased with any funds generated by any asset or entity in which the siblings now or in the past held an interest"; and "[a]ny funds received by any Defendant upon closing a merchant account." This order empowers the trustee to employ third parties and "to have the powers, authorities, duties and rights and privileges of a receiver that are governed by Florida case law and common law and equitable principles that are consistent with the factual findings and legal conclusions in the Post-Trial Order."

In an effort to identify and corral the assets over which the court seeks to impose a constructive trust, the court seeks to empower the trustee with authority allowed to a receiver. However, the record is silent as to the trial court's source of this authority. Further, it does not appear that Appellants were given notice or an opportunity to be heard on such a matter. In essence, the constructive trust morphed into a receivership, and it has done so without notice, hearing, or the necessary findings to support this extraordinary remedy. See DeSilva v. First Cmty. Bank of Am., 42 So. 3d 285, 288-89 (Fla. 2d DCA 2010) (discussing the pleading and hearing requirements for appointment of a receiver); Plaza v. Plaza, 78 So. 3d 4, 6 (Fla. 3d DCA 2011) ("Appointing a receiver is a rare and extraordinary remedy. . . . [I]t is an abuse of

[2]IDCM is a Panamanian company that may have at one time held legal title to the Websites. IDCM is not a named defendant in the second amended complaint, and any argument that it is nonetheless bound by the orders on a virtual representation theory was not presented below.

discretion to appoint a receiver in the absence of a showing that property is subject to a serious loss." (citation omitted)). This was an abuse of discretion.

III. CONCLUSION

To state the matter simply, the order imposing a constructive trust and the order appointing trustee far exceed the purpose of a constructive trust and the remedy it affords. To be sure, the trial court was given a challenging task in this unusual case to make order out of chaos. The flexible nature of a constructive trust may well make it an appropriate remedy for doing equity in this case. See Collinson, 903 So. 2d at 228 (noting the flexibility available in the remedy of a constructive trust to do equity between parties); Jensen v. Jensen, 824 So. 2d 315, 321 (Fla. 1st DCA 2002) (using a constructive trust essentially as a deferred distribution plan "because it was the most practical method of distributing the unvested stock options" that were not yet capable of being valued); see also Browning v. Browning, 784 So. 2d 1145, 1148 (Fla. 2d DCA 2001) (noting that a constructive trust may be imposed even against a recipient of funds who did not participate in the wrongful conduct). However, we reiterate that the remedy of a constructive trust is an extraordinary one that must be employed with caution and precision. See Collinson, 903 So. 2d at 228. Here, the constructive trust is overbroad as to the entities it attempts to enjoin, the assets it seeks to control, and the powers it grants to the trustee. Accordingly, we reverse the orders on appeal and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings.

ROTHSTEIN-YOUAKIM, J., Concurs.
SALARIO, J., Concurs with opinion.

SALARIO, Judge, Concurring.

Although I concur in the majority's reasoning and result—a remand for further proceedings—I am concerned that the use of the shareholders' derivative claim pleaded in count three of the second amended complaint to afford relief in this case will ultimately prove improper in its entirety. It is axiomatic that a derivative suit is one brought by a shareholder in the name of the corporation to vindicate a right belonging to the corporation and to secure a remedy for the benefit of the corporation. See § 607.07401(1), (2) (describing a shareholders' derivative action as one "brought in the right of a corporation"); Sinibaldi v. Sinibaldi ex rel. Get Strong, Inc., 100 So. 3d 72, 73 (Fla. 2d DCA 2011) ("[A] derivative action is by definition brought by a shareholder on behalf of a corporation."); Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So. 2d 381, 388 (Fla. 4th DCA 1999) ("A derivative suit is an action in which a stockholder seeks to enforce a corporate right or to prevent or remedy a wrong to the corporation, where the corporation . . . fails and refuses to take appropriate action for its own protection."); 3A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations, § 1041.10 (2019) ("A derivative action is a suit brought by shareholders to compel the corporation to bring an action enforcing the corporation's own rights against its fiduciaries or third persons."). Thus, in this case, a shareholders' derivative claim would be properly used to allege that Joseph Abdo breached fiduciary duties owed to Social Media, Inc. and to provide Social Media, Inc. a remedy for that breach. And for the most part, count three as pleaded reflects that basic understanding of how a

derivative claim works: It seeks an award of damages for breaches of fiduciary duties owed to Social Media, Inc.

The trial court's order imposing a constructive trust, however, does something profoundly different. It describes a dispute between Joseph Abdo, on the one hand, and his siblings, Khalil Abdo, Nada Abdo Quill, and Marie Abdo Silva, on the other, concerning ownership of website assets. Instead of finding a breach of a fiduciary obligation to Social Media, Inc., the order finds that Joseph Abdo owed and breached "a fiduciary duty to his brothers and sisters to act for their benefit." And instead of providing a remedy to Social Media, Inc., it imposes a constructive trust for the benefit of the siblings. The trial court's order contains no factual or legal justification for the use of a derivative claim to write a victory for private persons who are not the corporation in whose name suit was brought. And at oral argument, counsel for the siblings was unable to offer a coherent explanation for it. (That is not to fault counsel, who argued capably; it is just proof that the result is difficult to explain.)

It is hard for me to see how a remedy anything close to what the trial court fashioned here could properly be awarded on the derivative claim that was pleaded and tried. Among other problems, the trial court's order finds that it was a breach of Joseph Abdo's fiduciary duties to the siblings to transfer the website assets to Social Media, Inc. in the first place and gives rise to a remedy to benefit the siblings, not the company. See Sinibaldi, 100 So. 3d at 74 (holding that trial court erred in awarding an individual shareholder damages for breach of fiduciary duty in a claim lodged as a derivative action). Based on the arguments made by the parties here and the possibility that the declaratory judgment on count one might provide a basis for additional relief, see §

86.061, Fla. Stat. (2017), I agree that further proceedings are appropriate.[3] The majority opinion correctly holds, however, that count three "was brought only by Khalil Abdo, on behalf of Social Media, Inc, and the beneficiary of the claim is thus Social Media, Inc." To the extent relief is sought on remand on count three, this point should be front and center, and to the extent any relief is awarded on that count, it should be accompanied by findings that explain how and why such relief is appropriate on a derivative claim so that this court can meaningfully review the decision on appeal. See, e.g., Bailey v. St. Louis, 196 So. 3d 375, 377 (Fla. 2d DCA 2016) (reversing damages awarded after a nonjury trial where the trial court provided no explanation for its award, thus disabling this court's ability to review it).

[3]There is, I think, a separate question as to whether the pleadings upon which this case was tried permit the trial court to award relief resembling what it awarded here. See Musi v. Credo, 44 Fla. L. Weekly D281, D282-83 (Fla. 3d DCA Jan. 23, 2019) (holding that a trial court errs in awarding relief that is neither pleaded nor tried by consent); Chambliss v. Benedikter, 941 So. 2d 589, 591 (Fla. 4th DCA 2006) (same). The majority expresses no opinion on that question, however, and neither do I.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

NELSON P. and BARBARA J. SCHWOB; DARRELL L. and MARTHA K. BIRT; FRANK E. and LINDA J. BROWN; PAUL and SANDRA BROWN; DENNIS M. and CAROL J. COSMO; MARILYN C. MORSE; STEVEN P. and LAURIE A. CUMMINGS; KAROL FLEMING; SOLANGE GERVAIS; BERND J. and OPAL B. GIERSCHKE; CHARLES H. Sr. and CAROL L. LePAGE; JAMES L. and REBECCA L. MAY; LORI OFFER; ELVIRA PARDO; JAMES A. and JOYCE A. PASCO; DAVID L. and KAY J. SMITH; JAMES L. and FRANCES E. SMITH; JAMES E. and MARGO M. SYMONDS; JEANETTE M. TATRO; RICHARD and ARLENE TAYLOR; ANTHONY A. VARSALONE, JR.; and KATHLEEN R. VALK,

Petitioners,

v.

JAMES C. GOSS; EDWARD HEVERAN; MARGARET E. HEVERAN; and PALM TREE ACRES MOBILE HOME PARK,

Respondents.

Case No. 2D18-4480

Opinion filed August 7, 2019.

Petition for Writ of Certiorari to the Circuit Court for Pasco County; Gregory G. Groger, Judge.

Richard A. Harrison and Daniela N. Leavitt
of Richard A. Harrison, P.A., Tampa, for
Petitioners.

Jody B. Gabel and J. Allen Bobo of
Lutz, Bobo & Telfair, P.A., Sarasota,
for Respondents.

CASANUEVA, Judge.

The Petitioners own individual lots located in the Palm Tree Acres Mobile Home Park. The Respondents own and operate Palm Tree Acres, and they own and lease most of the remaining lots in the park. Historically, the Respondents have provided water and sewer service and access to recreational amenities to all residents of Palm Tree Acres for an all-inclusive monthly fee. The current litigation began after one of the Petitioners unsuccessfully sought to unbundle this monthly fee and to pay for only the water and sewer service. The Respondents countered that they have no obligation to provide any services to the Petitioners. The issue currently before this court is whether the circuit court erred in granting partial summary judgment in favor of the Respondents after finding that they have a constitutional right to discontinue water and sewer service to the Petitioners. The Petitioners filed this petition for writ of certiorari challenging the circuit court's order. We agree with the Petitioners that the circuit court's order departs from the essential requirements of the law and results in material injury to them for the remainder of the case that cannot be corrected on postjudgment appeal, and we quash the order.

I. Circuit Court Proceedings

In the Petitioners' third amended complaint, they assert 180 counts, including claims for declaratory relief and injunctive relief which allege that the

Petitioners are in doubt as to their legal and financial obligations to the Respondents and as to the legal rights of the Respondents to demand, charge, and collect payment of monthly fees. The Petitioners allege in the complaint that they purchased their lots in reliance upon the Respondents' representations and commitment to furnish potable water to their lots. They further allege that the Respondents have supplied and continue to supply potable water to the Petitioners by means of a water supply system, pumps, pipes, and connections that are owned and operated by the Respondents and that there is no other public supply of potable water available to the Petitioners.

The Petitioners state that they are willing to pay for such services, but the Respondents have failed and refused to provide them with any detailed accounting of the actual costs of the services and have threatened to terminate the services. The Petitioners asked the circuit court to enter a judgment finding, determining, and declaring the rights and duties of the parties with respect to the potable water supply and the amounts that the Petitioners can be charged for such water supply. They acknowledge that there is no written agreement between the parties with respect to the Petitioners' properties.

The Respondents filed a motion to dismiss the third amended complaint, arguing that the complaint's demand that the circuit court order the Respondents to provide utility services to the Petitioners and set the rates for those utility services is within the exclusive jurisdiction of the Florida Public Service Commission (PSC). The circuit court issued an order granting in part and denying in part the Respondents' motion to dismiss, finding that the determination regarding whether the Respondents

must provide water and sewer service to the Petitioners, and the rate that can be charged for such service, was within the jurisdiction of the PSC.[1]

Thereafter, the Respondents filed their answer, affirmative defenses, and counterclaims. In count one of the counterclaim, the Respondents sought a declaratory judgment that they are entitled to a full bundle of ownership rights that are guaranteed by article I, section 2, of the Florida Constitution. The Respondents filed a motion for partial summary judgment asking the circuit court to grant judgment in their favor on this counterclaim, arguing that only the circuit court has jurisdiction to determine this constitutional claim and that the PSC lacks jurisdiction to do so. The Petitioners filed an answer and affirmative defenses to the counterclaim alleging, among other grounds, that the PSC had exclusive jurisdiction over this issue.

The circuit court agreed with the Respondents' arguments and granted their motion for partial summary judgment. The court reasoned that the Respondents have a constitutional right to discontinue water and sewer service to the Petitioners.[2] The order states:

> Property rights are one the most basic rights protected by both the Florida and United States Constitutions. These rights include the ability to use, and not to use, the property as the owner of the property sees fit. The government may impose regulations on how a property is used, and

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[1]The court also found that the PSC had jurisdiction to resolve the question of whether the Respondents can claim the "landlord-tenant" exemption under section 367.022(5), Florida Statutes (2014).

[2]Although the circuit court cited article I, section 3, of the Florida Constitution, which involves religious freedom, it intended to cite article I, section 2, which states, "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property."

> neighboring property owners can seek to enjoin their neighbors from offensive or nuisance use of property. However, the Court is unaware of, and the Plaintiffs have not provided, any authority that the Court can compel a property owner to use its property in a manner solely for the benefit of a neighboring property owner.

II. Certiorari Standard of Review

This court's standard of review in a certiorari proceeding is limited to determining whether the circuit court's order is: "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal." Kelly v. Philip Morris USA Inc., 69 So. 3d 1078, 1079 (Fla. 2d DCA 2011) (quoting Parkway Bank v. Fort Myers Armature Works, Inc., 658 So. 2d 646, 648 (Fla. 2d DCA 1995)). A petition for writ of certiorari may be filed to challenge a circuit court's ruling in a declaratory action. See Star Ins. Co. v. Dominguez, 141 So. 3d 690, 693 (Fla. 2d DCA 2014) ("The circuit court's order denying [the petitioner's] motion to dismiss the declaratory judgment action brought against it by [the respondent] constitutes a departure from the essential requirements of the law causing irreparable harm to [the petitioner] that cannot be remedied on appeal.").

We conclude that the circuit court's order is a departure from the essential requirements of the law. As the circuit court had recognized in a previous order, the PSC has exclusive jurisdiction over disputes involving utility services, including the termination of such services. Further, the termination of utility services would cause a material injury to the Petitioners that cannot be remedied on appeal of a final judgment.

III. Jurisdiction of the Florida Public Service Commission

Section 367.011(2), Florida Statutes (2014), states that "[t]he Florida Public Service Commission shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates." "Utility" is defined as "a water or wastewater utility and, except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation." § 367.021(12); see also Utils., Inc. of Fla. v. Corso, 846 So. 2d 1159, 1161 (Fla. 5th DCA 2003) ("[T]he issue here [is] a dispute between the parties relating to the rates and charges for water and wastewater utility services which dispute is within the exclusive jurisdiction of the PSC.").

The circuit court's ruling that the Respondents have a constitutional right to terminate water and sewer service to the Petitioners is in conflict with section 367.011(2), which gives the PSC exclusive jurisdiction over each utility with respect to the services provided by the utility. See also § 367.165 ("It is the intent of the Legislature that water or wastewater service to the customers of a utility not be interrupted by the abandonment or placement into receivership of the utility.").

Although there do not appear to be any cases specifically on point, in Board of County Commissioners Indian River County v. Graham, 191 So. 3d 890 (Fla. 2016), the Florida Supreme Court addressed the jurisdiction of the PSC in relation to the rights of a property owner. Id. at 895-96. In that case, there was a franchise agreement between the city and the county, which gave the city the exclusive right to use property owned by the county "to construct, maintain, and operate an electric

system in unincorporated areas of the County." Id. at 892 (footnote omitted). The county refused to renew the franchise agreement, and it filed with the PSC a petition for declaratory statement asking for a declaration regarding its rights, responsibilities, and duties when the franchise agreement expired. Id.

In a separate PSC proceeding, the city filed its own petition for declaratory statement, alleging that the county's petition threatened to evict the city from providing service in the city's previously PSC-approved service areas once the franchise agreement expired. Id. at 893. The city asked the PSC to make the following two declarations: 1) the expiration of the franchise agreement has no effect on the city's obligation and right to provide utility service in previously approved territory; and 2) the city is required to continue to provide utility service in such areas without regard to the expiration of the franchise agreement. Id. The PSC ruled in favor of the city. Id.

The county argued on appeal that "the PSC erred in declaring that the City has the right and obligation to continue to serve its PSC-approved territory . . . after its franchise agreement with the County expires." Id. Pertinent to this appeal, the county argued that "the PSC's declaration improperly strips the County of its property rights and grants them to the City, unregulated and in perpetuity." Id. at 893-94. The Florida Supreme Court did not agree with the county's argument and held as follows:

> [W]e reject the County's argument that the PSC's order improperly grants the County's property rights to the City. Were we to hold otherwise, counties could do indirectly through franchise agreements what the PSC's "exclusive and superior" jurisdiction precludes them from doing directly. § 366.04(1), Fla. Stat. ("The jurisdiction conferred upon the commission shall be *exclusive and superior to that of all other* boards, agencies, political subdivisions, municipalities, towns, villages, or *counties*, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the

> commission shall in each instance prevail.") (emphasis added).

Id. at 896-97.

In the present case, the Respondents argue that the PSC does not have jurisdiction over issues related to the termination of the utility service because any order requiring them to provide service would deprive them of their property rights, and the circuit court has jurisdiction over this constitutional issue. We do not agree with the Respondents that the PSC does not have jurisdiction in this case simply because they own the land that is used to provide the utility service. If the Respondents had never provided utility service to the Petitioners, then they likely could not be forced to use their land to begin providing such service. However, the Respondents have been providing utility service to the Petitioners' homes for decades. As such, the Respondents are a provider of utility service pursuant to section 367.021(12), and the PSC has "exclusive jurisdiction" over them "with respect to [the Respondents'] authority, service, and rates." See § 367.011(2). The Respondents cannot claim that, because they own the land used to provide these services, their constitutional rights related to the ownership of that land divests the PSC of its jurisdiction. If the Respondents' argument were accepted, then a utility provider that owns the property used to provide such services could terminate those services and its actions would be outside the jurisdiction of the PSC; the PSC's jurisdiction over such disputes would be illusory at best. This was clearly not the intent of the legislature when it stated that the PSC has "exclusive jurisdiction over each utility with respect to its . . . service." Id.

Accordingly, we grant the petition for writ of certiorari and quash that portion of the partial summary judgment finding that the Respondents could terminate

water and sewer service to the Petitioners. This determination is within the exclusive jurisdiction of the PSC.

Petition for writ of certiorari granted.

KHOUZAM, C.J., and ATKINSON, J., Concur.

Third District Court of Appeal

State of Florida

Opinion filed August 7, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2146
Lower Tribunal No. 17-19708

Young Land USA, Inc.,
Appellant,

vs.

Credo LLC,
Appellee.

An appeal from the Circuit Court for Miami-Dade County, Pedro P. Echarte, Jr., Judge.

Herbert B. Dell, P.A., and Herbert B. Dell (Fort Lauderdale), for appellant.

Roniel Rodriguez IV, P.A., and Roniel Rodriguez IV, for appellee.

Before SALTER, MILLER, and GORDO, JJ.

MILLER, J.

Appellant, Young Land USA, Inc., seeks review of an order granting final summary judgment and quieting title to certain parcels of property in Miami-Dade County, Florida. Appellant contends that the lower tribunal erred in declaring that the realty is owned, without encumbrance, by appellee, Credo LLC, the purchaser at various execution sales conducted by the sheriff, as its lien was improperly extinguished.[1] For the reasons articulated below, we affirm.

FACTS

Four years after two separate judgment liens were recorded against property owned by a judgment debtor in the public records of Miami-Dade County, the debtor quitclaimed his real property holdings, consisting of several parceled lots, to appellant, an entity controlled by his sister. The same day, the debtor executed a mortgage, conveying an interest in the property to appellant, without receiving value in exchange. Thereafter, appellant recorded the mortgage.

Approximately one month later, appellant quitclaimed the subject property through four separate deeds: the first parcel back to the debtor; the second parcel to

[1] We write only to address a single issue raised on appeal and we assign no error to the remaining points. See Jones v. Fla. Ins. Guar. Ass'n, Inc., 908 So. 2d 435 (Fla. 2005) (discussing that affirmative defenses are waived if not pled) (citations omitted); Goldberger v. Regency Highland Condo. Ass'n, Inc., 452 So. 2d 583, 585 (Fla. 4th DCA 1984) ("Failure to plead an affirmative defense waives that defense, and an appellate court will not consider it in reviewing a summary judgment for a plaintiff.") (citation omitted).

an assumed identity concededly used by the debtor; the third parcel jointly to the debtor and an entity; and the fourth parcel to a different entity.

Several years later, the judgment holders each separately obtained writs of execution for the multiple parcels, and the Miami-Dade County Sheriff scheduled consecutive judicial sales of the subject property. Between the sales, appellant executed and recorded a satisfaction of its mortgage.[2] Appellee was the successful bidder at the sales.

Appellee filed suit in the lower tribunal seeking to quiet title, asserting the judgment liens were superior to any other encumbrance, the satisfaction of mortgage extinguished any interest held by appellant in the property, and the unfunded mortgage was the product of a fraudulent transfer effected to thwart the collection efforts of the judgment holders. Appellant filed a counterclaim seeking to foreclose its mortgage, contending its interest in the property was paramount. The trial court granted final summary judgment on both the primary claim and counterclaim in favor of appellee. The instant appeal ensued.

STANDARD OF REVIEW

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Volusia Cty. v.

[2] No recorded rescission of the satisfaction of mortgage appears in the record on appeal.

Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) (citing Menendez v. Palms W. Condo. Ass'n, 736 So. 2d 58 (Fla. 1st DCA 1999)). "Thus, our standard of review is de novo." Id.

ANALYSIS

Appellant asserts that its encumbrance was improvidently extinguished. "It is said that the purchaser at an execution sale takes only the right, title, and interest which the execution debtors had, subject to equities existing at the time the judgment was recorded." Mansfield v. Johnson, 51 Fla. 239, 252, 40 So. 196, 200 (1906). Accordingly, it is well-established that "the title delivered pursuant to an execution sale of real property relates back to the date of recordation of the judgment upon which the sale was based." Klein v. Advance Mortg. Corp., 450 So. 2d 601, 601 (Fla. 4th DCA 1984) (citations omitted); see also Sperling v. United States, 994 So. 2d 1139, 1140 (Fla. 3d DCA 2008) ("[T]he title under [a] sheriff's deed 'relates back' to the priority of the recorded judgment that is the basis for execution and sale.").

Here, the two certified judgments prompting the execution sales were recorded after the judgment debtor acquired title, and many years before appellant perfected any purported interest in the real property. Moreover, as correctly recognized by the trial court, "[w]hen a mortgage on land and the equity of redemption in the same lands become united in the same person, ordinarily the

mortgage is merged and the same ceases to be an [e]ncumbrance and the owner will hold the lands with an un[e]ncumbered title, if there be no other mortgage or lien." See Alderman v. Whidden, 142 Fla. 647, 649-50, 195 So. 605, 606 (1940) (citations omitted). In the instant case, following the execution of the mortgage, appellant reconveyed the property back to the judgment debtor.[3] Consequently, the mortgage "ceased to be an [e]ncumbrance." Floorcraft Distribs. v. Horne-Wilson, 251 So. 2d 138, 141 (Fla. 1st DCA 1971).

Accordingly, as both the reconveyance of the property back to the judgment debtor, following the recordation of mortgage, and the title derived from the execution sales, relating back to the date of the judgment liens, extinguished any other encumbrances on the property, we conclude the trial court correctly determined appellee is endowed with paramount title. Thus, we affirm.

Affirmed.

[3] Although the lower tribunal did not elaborate its basis for granting summary judgment, the record is replete with evidence of fraudulent transfer. See § 726.106(1), Fla. Stat. (2019) ("A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.").

Third District Court of Appeal

State of Florida

Opinion filed August 7, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2547
Lower Tribunal No. 18-12250

Frederick Greene, etc.,
Appellant,

vs.

Jeffrey Johnson, et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Spencer Eig, Judge.

Hall, Lamb Hall & Leto, P.A., and Matthew P. Leto, for appellant.

Perlman Bajandas Yevoli & Albright PL, and Jonathan Feldman (Fort Lauderdale); Alhalel Law, and Joshua R. Alhalel, for appellees.

Before SCALES, MILLER and GORDO, JJ.

SCALES, J.

Frederick Greene, the plaintiff below, derivatively on behalf of both Oak and Cane Co. ("Oak") and Oak & Cane Holdings, LLC ("Holdings"), appeals the trial court's order granting a motion to compel arbitration and stay litigation by the appellees, defendants below, Jeffrey Johnson, Cameron Grace, Joseph Villatico[1] and O&C Spirits, LLC. We affirm the order as to Greene's derivative claims brought on behalf of Oak, but we reverse as to Greene's derivative claims brought on behalf of Holdings.

I. Background

In 2016, Greene and Grace incorporated Oak to manufacture and sell Oak & Cane American Craft Rum. Each had a fifty percent ownership interest in Oak. In January 2017, Greene and Grace: (i) hired Villatico to serve as Director of Sales and Promotional Strategies; (ii) formed Holdings as a separate entity to own the brand's trademarks and other intellectual property; and (iii) received a $300,000 investment in Oak from Johnson in exchange for a seven and a half percent ownership interest in both Oak and Holdings.[2]

[1] While both the initial brief and the answer brief in this appeal identify Villatico as an appellee, the circuit court docket reflects that Villatico was not served with the complaint and, to date, has not participated in the litigation below. Hence, this Court does not have jurisdiction over Villatico. See Seymour v. Panchita Inv., Inc., 28 So. 3d 194, 196 (Fla. 3d DCA 2010) ("A summons properly issued and served is the method by which a court acquires jurisdiction over a defendant.").

[2] The record does not specify the final ownership interests of Greene and Grace in Oak and Holdings after Johnson acquired his interest in each company.

To provide additional capital, Johnson loaned $200,000 to Oak in May 2017, and another $100,000 in July 2017. The loan agreements between Oak and Johnson contain broad dispute resolution provisions that require arbitration for any "dispute, claim or controversy arising out of or relating to" the loans.[3]

After Johnson made both loans to Oak, conflict arose from Greene's incurring of expenses, and Greene withdrew from his management position in Oak. Subsequently, Johnson sent notices of default to Oak. On January 18, 2018, Johnson, Grace, Villatico, Oak, and Holdings entered into a settlement agreement, under which Johnson received full ownership of the assets and intellectual property owned by both Oak and Holdings. Greene did not sign this settlement agreement.

[3] In relevant part, section 27 of each of the two loan agreements between Oak and Johnson reads as follows:

> Dispute Resolution: If there is any dispute, claim or controversy arising out of or relating to this Agreement or any Note or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this Section [27], the Party claiming a dispute will serve notice on the other Party. . . . In the event that good faith attempts of resolution and mediation fail to provide a resolution to the dispute, resolution of the dispute shall be determined by binding arbitration. . . . The Parties acknowledge that they are irrevocably waiving the right to a trial in court, including a trial by jury and that all rights and remedies will be determined by an arbitrator and not by a judge or jury.

On April 16, 2018, Greene, purportedly on behalf of both Oak and Holdings, filed derivative claims[4] against Johnson, Grace, Villatico, and O&C Spirits, a company formed in December 2017, by Johnson, Grace, and Villatico. Greene alleges that the defendants conspired to and carried out a plan to divert the property, assets, and goodwill of Oak and Holdings to O&C Spirits. Additionally, Greene alleges that Johnson and Grace breached the fiduciary duties of care and loyalty that they owed to Oak and Holdings as managers and members of these companies.

After being served with Greene's derivative action, Johnson moved to compel arbitration of Greene's derivative claims against him, citing the broad arbitration provisions in the May and July 2017 loan agreements entered into between Johnson and Oak. Grace and O&C Spirits joined in Johnson's motion to compel arbitration. On November 14, 2018, the trial court entered an order granting the motion as to the defendants, and Greene now timely appeals this order.

II. Analysis[5]

A. Standard of Review

[4] See Dinuro Invs., LLC v. Camacho, 141 So. 3d 731, 738 (Fla. 3d DCA 2014) (defining a derivative suit as an action in which a stockholder seeks to enforce a right of action existing in the corporation).

[5] We have jurisdiction to review a non-final order determining entitlement of a party to arbitration. Fla. R. App. P. 9.130(a)(3)(C)(iv).

"While we review a trial court's ruling on a motion to compel arbitration de novo, we are mindful that arbitration provisions are favored by the courts and that all doubts should be resolved in favor of arbitration." CT Miami, LLC v. Samsung Elecs. Latinoamerica Miami, Inc., 201 So. 3d 85, 90 (Fla. 3d DCA 2015) (citations omitted).

B. Greene's Derivative Claims on Behalf of Oak Against Johnson

Arbitration provisions – such as the ones in the loan agreements between Oak and Johnson – containing the phrase "arising out of or relating to" have been interpreted broadly to encompass claims between the contracting parties that require reference to or construction of some portion of the contract. Seifert v. U.S. Home Corp., 750 So. 2d 633, 637-38 (Fla. 1999). Greene's derivative claims against Johnson – brought on behalf of Oak – require reference to the loan agreements because Greene's claims of conversion, conspiracy, and breach of fiduciary duty require an ultimate determination of whether there was a breach under the loan agreements preceding the settlement agreement. Specifically, as framed in the pleadings, this involves consideration of whether the second loan agreement was mature, whether both loan agreements contained usurious interest rates, and whether Johnson complied with all dispute resolution processes.

If Oak had brought the claims directly against Johnson (as opposed to Greene bringing the claims derivatively), Johnson's defense would "relate to" the loans, so

as to implicate the plain language of the loan agreements' arbitration provisions. Johnson, therefore, is able to compel arbitration of Greene's derivative claims brought on behalf of Oak under the loan agreements' broad arbitration provisions. See id.

C. Greene's Derivative Claims on Behalf of Oak against the Non-Signatory Defendants

Non-signatories to a contract containing an arbitration provision, such as appellees Grace and O&C Spirits, may compel arbitration of claims brought by a signatory based on the doctrine of equitable estoppel if the signatory raises allegations of concerted misconduct by both the non-signatory and one or more of the signatories to the contract. Marcus v. Florida Bagels, LLC, 112 So. 3d 631, 633-34 (Fla. 4th DCA 2013). Greene's derivative claims on behalf of Oak against these non-signatory defendants are based on the same set of operative facts that Greene alleges against signatory Johnson, that is, a conspiracy by the defendants to divert Oak's assets to O&C Spirits. Similarly, the defenses of the non-signatory defendants will be dependent upon, if not the same as, Johnson's defenses, premised on Johnson's rights outlined in the loan agreements containing the arbitration provisions. Against this backdrop, we agree with the trial court that Greene is estopped from avoiding arbitration of all the derivative claims he brought on behalf of Oak. See id.

D. Greene's Derivative Claims on Behalf of Holdings against all Defendants

The appellees argue that Greene also should be equitably estopped from avoiding arbitration of the claims brought by Greene on behalf of Holdings. The appellees argue that, because these derivative claims are intertwined with the arbitrable claims brought on behalf of Oak, Greene should be required to arbitrate the claims brought on behalf of Holdings despite there being no underlying agreement compelling arbitration between Holdings and any of the appellees. The doctrine of equitable estoppel on the basis of intertwined claims, however, applies when a *signatory* to a contract containing the arbitration clause raises allegations of substantially interdependent and concerted misconduct by both a non-signatory and one or more of the signatories to the agreement. Marcus, 112 So. 3d at 633-34.[6] An obligation to arbitrate is based on consent, and therefore, the claims brought by Greene on behalf of Holdings, which is a non-signatory to the loan agreements, are not subject to the arbitration provisions in the loan agreements.[7] Id. Accordingly, we

[6] Appellees have cited no cases applying the doctrine where, as here, the claim is brought by a non-signatory.

[7] We do not need to consider whether Holdings is bound to the arbitration clause under another doctrine, such as an agency principle, because the appellees do not raise an alternate argument in their briefs. See E.K. v. Dep't of Children & Family Servs, 948 So. 2d 54, 57 (Fla. 3d DCA 2007) (explaining that while the "Tipsy Coachman" doctrine allows an appellee to raise unpreserved alternate grounds for affirmance, appellate courts should not consider arguments not contained in an answer brief).

reverse that part of the trial court's order compelling arbitration of Greene's derivative claims brought on behalf of Holdings.

III. Conclusion

The trial court properly compelled arbitration of Greene's derivative claims brought on behalf of Oak, a signatory to the loan agreements containing the arbitration provision. The claims brought by Greene on behalf of Holdings, a non-signatory to the loan agreements, though, are not subject to arbitration. We affirm that part of the challenged order as it relates to Greene's derivative claims brought on behalf of Oak, but reverse that portion of the order staying the proceedings and requiring arbitration of the claims brought on behalf of Holdings, and remand for further proceedings on those claims.

Affirmed in part, reversed in part, and remanded.